

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	15-CR-637(KAM)
	:	
	:	U.S. Courthouse
	:	Brooklyn, New York
-against-	:	
	:	TRANSCRIPT OF
	:	STATUS CONFERENCE
	:	
MARTIN SHKRELI and	:	April 7, 2017
EVAN GREEBEL,	:	12:00 p.m.

Defendants.

BEFORE:

HONORABLE KIYO A. MATSUMOTO, U.S.D.J.

APPEARANCES:

For the Government:

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For the Defendant
Shrekli:

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BY: BENJAMIN BRAFMAN, ESQ.
MARC AGNIFILO, ESQ.
ANDREA ZELLAN, ESQ.
JACOB KAPLAN, ESQ.

Greebel:

GIBSON, DUNN & CRUTCHER, LLP
BY: LISA RUBIN, ESQ.
REED BRODSKY, ESQ.
WINSTON CHAN, ESQ.

Proceedings

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1 Court Reporter: Holly Driscoll, CSR, FCRR
2 Official Court Reporter
3 U.S. District Court - EDNY
4 225 Cadman Plaza East
5 Brooklyn, NY 11201
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5 Proceedings recorded by mechanical stenography, transcript
6 produced by Computer-Assisted Transcript.

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10 THE COURT: Good afternoon. Have a seat, everybody.

11 THE CLERK: This is criminal cause for hearing,

12 15-CR-637, USA versus Martin Shkreli and Evan Greebel.

13 Will the government's attorney state your appearance
14 please.

15 MS. SMITH: Good afternoon, Your Honor, Alixandra
16 Smith, Jacquelyn Kasulis, Winston Paes and Karthik Srinivasan
17 for the government.

18 THE COURT: Good afternoon.

19 MR. BRAFMAN: Good afternoon, Your Honor, Benjamin
20 Brafman, Mark Agnifilo, Andrea Zellman, Jake Kaplan and,
21 pending admission, Teny Geragos for Mr. Shkreli.

22 THE COURT: Good afternoon, and good afternoon,
23 Mr. Shkreli.

24 MS. RUBIN: Good afternoon, Your Honor, Lisa Rubin,
25 Reed Brodsky and Winston Chan for Mr. Greebel.

Proceedings

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1 THE COURT: Good afternoon.

2 MR. BRODSKY: Good afternoon, Your Honor.

3 THE COURT: Good afternoon, Mr. Greebel.

4 I scheduled this conference because the government
5 had filed an application requesting a hearing to flesh out
6 some of the issues. I have Mr. Shkreli's response and
7 although Mr. Greebel did not take a position, they submitted a
8 20 page brief and an affidavit from a law professor at
9 Georgetown stating a position on this which I've considered.

10 I think what I'd like to address is whether
11 Mr. Brafman objects outright to a hearing or whether he's
12 objecting to a hearing at this time. Part of my thinking was
13 that if we were going to have a hearing, it would be
14 advantageous to all the parties to know well in advance of
15 trial rather than wait until two or three days before trial or
16 even in the middle of trial. So, I'm happy to hear from the
17 parties.

18 MR. BRAFMAN: Your Honor, thank you. I think in the
19 letter reply which the government submitted last night I think
20 they essentially concede that they are not asking for a
21 hearing at this time. I think holding a hearing three months
22 prior to trial where a defendant is essentially required to
23 produce his defense including the defense exhibits has never I
24 think been done and in the cases cited where a 104 hearing has
25 been required it's generally been held on the eve of trial or

1 certainly after discovery has been completed but, most
2 respectfully, Judge, what we have prepared which we would like
3 to submit in camera under seal for Your Honor's ex parte
4 review is a brief affidavit with attached exhibits which lays
5 out what we believe to be the uncontradictable evidence that
6 is in the government's own discovery that demonstrates that
7 there is a very valid reliance on counsel defense in this case
8 and indeed a compelling reliance on counsel defense.

9 So, I would object to the hearing and let me just
10 briefly make the following representations to the court: The
11 discovery in this case includes tens of thousands of e-mails
12 between Mr. Shkreli and Mr. Greebel and other members of the
13 Katten law firm. When you look just at the Greebel e-mails
14 alone, there is involvement by Mr. Greebel in virtually every
15 aspect of the government's case. That firm billed over
16 \$500,000 in connection with MSMB related work and close to
17 nine and a half million dollars with respect to Shkreli
18 related and Retrophin issues. And the tone of the e-mails and
19 the subject matter of the e-mails covered virtually everything
20 that is in this indictment, whether it is MSMB related,
21 Fearnow related or Retrophin related.

22 And if I can, in very short manner, explain the
23 defense of Martin Shkreli; while it involves an advice of
24 counsel defense and I think we will meet the very low
25 threshold, more than the low threshold required to get that

1 jury charge at the end of the case, I think it is important
2 for the Court to focus on what we focused on in our written
3 response and that is the issue of criminal intent and I think
4 what the government has never understood, with respect, and
5 has never been willing to accept is the following argument,
6 which is no secret because I think we've made it clear in our
7 papers, if Martin Shkreli is charged with intentionally
8 defrauding a series of investors and also Retrophin, it is our
9 position that he never intended to defraud anyone and that
10 regardless of what argument they may make, if, for example,
11 assets under management, at the time Martin Shkreli made the
12 representation there's other documentary evidence to suggest
13 that it was not an accurate statement, we nevertheless are
14 entitled to an argument that even if that statement was either
15 mistaken or misunderstood by what Shkreli intended by assets
16 under management, because in addition to the MSMB assets he
17 had other assets which were under management which gave him
18 credibility as an investment or hedge fund entrepreneur and,
19 nevertheless, the issue is did he intend to defraud anyone by
20 making that statement and our argument is that Martin
21 Shkreli's whole life from the time of MSMB through Retrophin
22 is demonstrated by a Herculean effort to repay the people who
23 invested the money and I think, quite frankly, at the end of
24 the day he was successful and in order to repay them, they
25 either entered into settlement agreements or consulting

1 agreements.

2 Now, the government cavalierly rejects those
3 agreements as sham agreements and that's just not the case.
4 Based on our investigation, there was at least one arbitration
5 that upheld the agreement as being valid and ruled in favor of
6 the applicant in that case who was entitled to compensation
7 for the consulting services he provided under the terms of the
8 consulting agreement that is charged in the indictment as a
9 sham indictment. But, on the issue at hand, it is beyond
10 dispute that with respect to the investors, with respect to
11 the consulting agreements and the settlement agreements, there
12 is correspondence by Evan Greebel directly with many of these
13 investors copying Martin Shkreli, there is correspondence in
14 the form of e-mails with Evan Greebel and many of the
15 investors' lawyers working out the terms of the settlement
16 agreements, working out the terms of the consulting
17 agreements.

18 So, Martin Shkreli, we have a right to argue, had a
19 right to assume that everything that was being done in
20 connection with the settlement agreements and the consulting
21 agreements was being passed on by his lawyer who he did not
22 consider to be part of a fraud, who he considered to be a very
23 capable lawyer, a partner in a large firm, and what's ironic
24 about this case is when you look at the statement of Evan
25 Greebel post-arrest which the government may or may not decide

1 to attempt to introduce into the trial, and we'll get to that
2 on the severance argument, he tries very hard to distance
3 himself from Martin Shkreli in what as a former prosecutor I
4 would label a false exculpatory statement because despite his
5 statement to the agents that he had nothing to do with Martin
6 Shkreli or made it appear that he didn't provide any real
7 service, he's intimately involved in everything that happens.

8 So, on the issue of criminal intent, the law firm
9 providing the services billed Mr. Shkreli almost \$10 million
10 for their services. The billing records, the detailed time
11 records show that the work that they're billing for included,
12 among other things, the principal components of the
13 government's claim of fraud in this case. The claim of fraud
14 is based in part on sham consulting agreements, sham
15 settlement agreements. Now, these are going to be questions
16 of fact for a jury to decide, these are going to be questions
17 of fact for a jury to decide, A, credibility of the witnesses;
18 B, most importantly, Martin Shkreli's criminal intent.

19 So, most respectfully, Your Honor, when I saw the
20 Court's ruling and I read the government's papers, my first
21 instinct was, let's assume for the purposes of discussion that
22 we finish the government's case and we make the decision that
23 we want to put the defendant on the stand and the substance of
24 his testimony is I relied on Evan Greebel at every point in
25 this case and even though he may not have been my lawyer on

1 the very first day, I nevertheless believed that by paying
2 these people back, it was demonstrating my good faith at the
3 time I made these representations and I never intended to
4 defraud any of them, and I don't think that kind of defense
5 needs to be fronted and I don't think it can be fronted
6 without you holding, Your Honor, a trial within a trial.

7 Now, the cases they have cited are I think
8 distinguishable in large measure and we're not talking about
9 an affirmative defense, we're talking about a defense to an
10 element of the crime. In a duress case, for example, if you
11 did everything --

12 THE COURT: May I just stop you, sir, I don't mean
13 to interrupt your train of thought, but are you saying that
14 you're not going to assert an advice of counsel defense, you
15 just want to be able to present evidence relating to
16 Mr. Shkreli's lack of intent?

17 MR. BRAFMAN: No, I think the advice of counsel
18 defense will be requested and it goes hand-in-hand with the
19 lack of criminal intent and I think they are joined at the hip
20 and cannot be separated and I think in this case in particular
21 it is really appropriate because you have Mr. Greebel
22 providing advice throughout the course of conduct which bears
23 on the issue of criminal intent and I think a jury has a right
24 to consider the following argument, if you are hiring a very
25 prominent law firm to advise you in how to proceed and if they

1 are drafting the settlement agreements and they are drafting
2 the consulting agreements and they are interfacing with
3 counsel for the investors, could a reasonable juror conclude
4 that Martin Shkreli had a right to assume and rely on the fact
5 that they were blessing these materials and for them to say,
6 well, you didn't tell me about A, you didn't tell me about B,
7 so therefore the reliance of counsel defense shouldn't apply,
8 that's a question of fact as to whether Mr. Greebel did in
9 fact have that information or whether Mr. Greebel did in fact
10 just want to ignore the materials because included in the
11 exhibits that we have and which will be submitted to Your
12 Honor, so important was Martin Shkreli as a client to Evan
13 Greebel during the time when he says I didn't really do much
14 for him is when he talks to the compensation committee in his
15 own firm about trying to get more money in several years
16 during the period in question, he is pointing to the Shkreli
17 work as evidence of how important this client and he is to the
18 firm. Now, it just flies in the face of a statement by
19 Mr. Greebel, well, I didn't know about X, Y and Z and if you
20 have -- we'll get to the severance issue, I think, Your Honor,
21 if you read --

22 THE COURT: How is the amount of billing that
23 Mr. Greebel and his firm did to Mr. Shkreli and the related
24 companies, how does that bear on your position that -- his
25 argument that he either received untrue information or that

1 Mr. Shkreli made material omissions, how does that relate?
2 I'm trying to understand the connection between what was
3 billed, as you argue, you seem to emphasize the amount of
4 money that Mr. Shkreli paid to the firm.

5 MR. BRAFMAN: I think the amount of money is
6 relevant because when you look into the details of the time
7 records, a lot of the money that Mr. Shkreli paid for was work
8 performed by Katten in preparing consulting agreements that
9 the government claims are part of the fraud and preparing
10 settlement agreements that the government claims are part of
11 the fraud and you can't just cherry-pick moments in time in
12 this case. Our argument from the beginning is that Martin
13 Shkreli never intended to defraud any of these investors.
14 We've spoken to some of the investors. Many of these
15 investors came out smelling like a rose in this case. This
16 may be the only fraud trial in the history of America where I
17 think the investors weren't really defrauded.

18 So, at the end of the day Mr. Greebel's position in
19 his own trial or as part of his own defense that I was never
20 told A, B or C is a question of fact for the jury, it's not
21 for the government to tell you in advance of trial, Your
22 Honor, that you must accept that as a fact in order to decide
23 your ruling in this case. We have a right to present all the
24 evidence to the jury and then ask them to conclude whether you
25 believe that Mr. Shkreli acted reasonably in relying on

1 Mr. Greebel and whether or not Mr. Greebel was in fact
2 provided with all of the information because what you have in
3 some of the e-mail traffic is not just Mr. Shkreli doing
4 things, you have Mr. Greebel telling him how to do things. I
5 mean this story that they've I think fabricated that he really
6 had nothing to do --

7 THE COURT: Sorry, I think you bounced on the mic,
8 I'll turn it off.

9 MR. AGNIFILO: I think it's better.

10 MR. BRAFMAN: This claim that Mr. Shkreli deceived
11 Mr. Greebel I think is belied by the facts and I think it will
12 be a reasonable inference a jury could draw that Greebel knew
13 everything about everything at the time he came to be
14 Shkreli's attorney and I think that is a defense we have a
15 right to proffer to the jury.

16 Now, Your Honor, at the end of the trial after all
17 of the evidence has been heard if Your Honor concludes that we
18 haven't met the threshold of a reliance of counsel defense, we
19 may still have a good faith defense based on the lack of
20 criminal intent, that is a completely separate charge that
21 Your Honor can give even in the absence of an advice of
22 counsel defense but I think they are joined at the hip. I
23 think Your Honor will see that the reliance on counsel
24 defense, the proof supporting it is very strong and somewhat
25 akin to an entrapment defense. The courts have suggested that

1 there's a low threshold of proof that a defendant needs to
2 provide in order to get the defense. Now, the jury may reject
3 the defense, the government may offer proof against the
4 defense but to cut us off at the pass before, A, discovery has
5 been completed, before we get the 3500 material, we're still
6 working with Retrophin's counsel to get additional materials,
7 I'm not being critical of anybody but that's the fact, but
8 just based on what we've seen, I would like to submit the
9 affidavit because what we've done is we've selected categories
10 of documents that clearly support what we believe to be the
11 proof of reliance of counsel defense and I don't think we
12 should be required to give the government our proof on the
13 lack of criminal intent by Martin Shkreli and proof that
14 supports the advice of counsel defense.

15 Now, after reading the submissions immediately prior
16 to trial Your Honor still wants to conduct a brief hearing,
17 that's different because then we will have the government's
18 3500 material, hopefully by then we will have finished the
19 discovery review. So, right now we're objecting to a hearing.
20 We don't think it is required and we don't think the defendant
21 needs to prove a lack of criminal intent. I think they have
22 to prove criminal intent. And I think on the advice of
23 counsel defense, if we don't meet the threshold, the same
24 evidence is going to be introduced at trial to attack the
25 argument with respect to Shkreli's criminal intent, so it's

1 not like it is going to be evidence that's going to be
2 inadmissible because it is strictly focused on a reliance of
3 counsel defense only. That material is going to be introduced
4 and I think admissible because the authentication is not going
5 be an issue, most of it comes out of the government's
6 materials provided to counsel and most of it is going to be
7 used to confront witnesses who are going to testify who claim
8 that they were defrauded when their lawyers and Mr. Greebel
9 are in correspondence about the wording of the settlement
10 agreement, about the wording of the investor consulting
11 agreement.

12 So, I think to answer Your Honor's question
13 specifically, yes, we object to a hearing on 104 but if Your
14 Honor is going to hold it, we ask that Your Honor await, if
15 you must, until right before trial as any other judge who's
16 reviewed this issue has determined. And in the cases cited by
17 the government, I don't think they stand for the propositions
18 that we are discussing here, certainly not the Judge Hurley
19 decision, that was a discrete question that he had to address,
20 it's nothing like the facts in this case. So, I'd ask Your
21 Honor to accept our submission under seal.

22 THE COURT: Who signed the affidavit?

23 MR. BRAFMAN: Me, it is my affidavit.

24 THE COURT: All right. Well, don't we need to hear
25 from -- I'm just asking whether we should be hearing from the

1 person who wants to assert the defense, because you don't have
2 personal knowledge about the elements that are necessary to
3 establish the advice of counsel defense which I think you cite
4 in your brief, that the party seeking to avail himself of the
5 defense must show that he honestly and in good faith sought
6 the advice of counsel. You can't do that.

7 MR. BRAFMAN: Right. Your Honor, what we have done
8 in the affidavit is concluded based on the exhibits attached
9 that we would have a right to argue the advice of counsel but
10 if what Your Honor wants is a short affidavit in addition to
11 this from Mr. Shkreli that he relied on Evan Greebel, we would
12 be prepared to provide that by next week.

13 THE COURT: Well, the second element is that the
14 party must establish that he fully and honestly put forth all
15 the facts before his counsel.

16 MR. BRAFMAN: I understand that.

17 THE COURT: So, again, I think it would be difficult
18 for you without having had personal knowledge to make that
19 statement under oath as a matter of fact.

20 MR. BRAFMAN: I agree but I can make a statement
21 based on the materials I have reviewed that it is absolutely
22 clear to us that Mr. Shkreli provided Mr. Greebel with enough
23 information so that he had a right to rely on his information
24 and that the government then needs to show that we didn't
25 provide him with all of the information and I don't think they

1 will ever be able to show that but we can make that
2 representation based on the documents. I think Your Honor can
3 draw from the documents the conclusion that is inescapable
4 that Mr. Greebel was not acting in the dark and if what Your
5 Honor needs is a statement by Mr. Shkreli or a short affidavit
6 that he provided all of the information to Mr. Greebel, we
7 would be prepared to consider that and provide it to Your
8 Honor as well.

9 THE COURT: All right. Thank you.

10 Ms. Smith.

11 MS. SMITH: Yes, just to briefly respond because I
12 think our reply brief today really covers a lot of this
13 ground; as an initial matter, substantive motions can't be
14 decided on an ex parte submission and so if the Court
15 determines to hold a hearing or to consider this issue prior
16 to trial, it should do so with materials that both parties are
17 able to see. It sounds like the materials attached to the
18 affidavit are materials we produced, I see no reason why we
19 shouldn't be able to consider them. If Mr. Shkreli is going
20 to put in an affidavit or proffer what statements he would
21 testify to at trial, we obviously have a right to challenge
22 them, that is the point of the hearing.

23 So, if Mr. Brafman's objection is that the
24 particular collection of documents they've assembled to
25 support their claims, it's unfair to reveal those to us now

1 because it lays out their defense too far in advance of trial,
2 as we've said, we have no problem with delaying the hearing to
3 closer to trial. I respectfully submit that two or three days
4 before trial, as in some of these other cases, wouldn't be
5 appropriate here because this is so complex but certainly
6 closer to trial, post-3500 seems like a reasonable suggestion.

7 THE COURT: My concern, Mr. Brafman, from your point
8 of view is that the cases that have been cited by my
9 colleagues in the Eastern District were fairly simple cases
10 and were not the kind of complex paper heavy case that we have
11 here and if I were to hold a hearing three days before trial
12 and make rulings that could possibly cut the legs out from
13 under your primary defense, then you would want more time I
14 would think to regroup. So, part of the reason for exploring
15 whether a hearing would be appropriate earlier rather than
16 later was to make sure that you didn't feel that you were in
17 an adverse position because you may not have received the
18 ruling that you wanted. I'm not saying that I'm prejudging or
19 I'm hinting anything, I'm just saying that this is the kind of
20 case where I think the more notice you have the better as to
21 what the parameters of the case will look like and I think the
22 government as well, they will know how to prep their witnesses
23 and their cross-examinations or whatever. Did we set a date
24 for 3500 material?

25 MS. SMITH: Yes, there's a date in the schedule.

1 THE COURT: Okay, so we can look at a date after
2 that when you have a chance.

3 MR. BRAFMAN: Your Honor, just so the record is
4 clear, I'm not trying to interrupt but I just want to respond
5 to this, our position is that there should be no hearing on
6 this issue, that it is not necessary, that it is not required
7 as a matter of law and that we should not have to front our
8 defense to the government in advance of trial because at the
9 end of the day, Your Honor, I think based -- the reason why we
10 want to submit this ex parte is because although much of the
11 material comes from the government, the way it is put together
12 and the arguments we made is part of the defense argument that
13 they really don't have a right to see at this time but what we
14 are trying to do is convince Your Honor that we have a good
15 faith basis to suggest that a hearing is not necessary and
16 that the issues in question will allow for this evidence into
17 trial on the issue of advice of counsel and on the issue of
18 criminal intent and if at the end of trial Your Honor
19 concludes that an advice of counsel defense is not
20 appropriate, you will not charge it but how do you make this
21 determination before you hear, for example, from the defendant
22 or defense witnesses, should they choose to testify, on a
23 defense that may be uniquely available to him and him alone
24 and Evan Greebel and Evan Greebel alone, I don't know how you
25 can make a ruling on the basis of a hearing and I'm not aware

1 of any case that requires the defendant to provide his
2 testimony to the government in advance of trial or make the
3 decision as to whether he will or will not testify until the
4 government rests when those decisions are made.

5 Now, we may make a strategic decision to rest and
6 not call the defendant and argue from the testimony that we
7 have established a sufficient legal threshold for the charge
8 to apply but this is not a case as some of the cases where the
9 presence of the attorney's e-mails is going to confuse the
10 jury. We have a co-defendant at present who is an attorney.
11 Even if you grant our severance, as we think you should, at
12 the end of the day the jury is going to hear about Evan
13 Greebel from many of the government witnesses, is going to see
14 much of the Greebel correspondence from which you can draw the
15 inference that he is giving substantial advice to Mr. Shkreli.

16 So, it is not a case where the injection of an
17 attorney from a prominent firm implies confusion to the jury
18 because they might rely on this even in the absence of an
19 advice of counsel defense. I have a right to argue on the
20 issue of criminal intent the fact that he was working with the
21 prominent law firm allowed him to believe that he was not
22 doing anything illegal when these consulting agreements and
23 settlement agreements were being drafted even if you don't
24 give a reliance of counsel charge.

25 So, our position is that a hearing is not required,

1 that it is a waste of everyone's time because unless you force
2 the defendant, for example, to testify at a hearing, which I'm
3 not certain would be appropriate, you may not have the whole
4 evidence before you and I agree with you, most respectfully,
5 this is not a typical case of where reliance of counsel is
6 being proffered because the attorney of record is in this case
7 whether you give an advice of counsel charge or not because
8 they're going to try and target Mr. Shkreli with things that
9 Mr. Greebel did on his behalf and we're going to have to rebut
10 that.

11 THE COURT: Thank you.

12 Ms. Smith.

13 MS. SMITH: So, I'll try and make sure I cover the
14 points from both arguments.

15 THE COURT: You can start over if you want.

16 MS. SMITH: So, I actually think what Mr. Brafman
17 has said today illustrates exactly why a hearing is necessary
18 because what I've heard from him are statements about Evan
19 Greebel, who is charged as a co-defendant and who absolutely
20 will be present in the government's case-in-chief, e-mails and
21 conversations, but there are many, many other attorneys
22 involved here. There were many other attorneys billing at
23 Katten, there were at least two or three law firms associated
24 with MSMB and with Retrophin in addition to Katten, and all I
25 have heard Mr. Brafman talk about is Mr. Greebel and the

1 settlement and consulting agreements. That's one attorney and
2 that's one count which is Count Seven. There's Count Eight
3 which involves the unrestricted shares schemes and there are
4 the first six counts which talk about the MSMB schemes and I
5 really think that was the focus of our initial motion.

6 There is a basic threshold that needs to be crossed
7 in order to advance an advice of counsel defense at trial and
8 Mr. Brafman is conflating kind of a general good faith defense
9 and advice of counsel which is a species of the good faith
10 defense. An advice of counsel is more specific and the cases
11 are very clear that if you want to argue that you relied on a
12 particular attorney, you need to show that you consulted with
13 that attorney at the very least in connection with the charged
14 conduct and our motion was made in part because it seems clear
15 to us from the evidence that on certain of the counts and for
16 many of these attorneys Mr. Shkreli cannot make out that
17 threshold showing that he actually consulted with an attorney
18 before he did something and we spoke specifically about, for
19 example, sending out statements to MSMB capital investors
20 which were sent out prior to, for example, when Katten was
21 engaged.

22 So, given the number of attorneys that are kind of
23 in the mix here and the number of different counts, what our
24 concern is is that Mr. Brafman is going to get up in opening
25 statement and say something like Mr. Shkreli was lawyered up

1 to the hilt, he had a hundred lawyers working for him, he paid
2 \$10 million, there were 10,000 e-mails, everything he did was
3 blessed by an attorney and therefore he can rely on the
4 attorney and he didn't have the intent to commit the crime and
5 that is just so far beyond what he's actually permitted to
6 argue. He may well be able to make that threshold showing on
7 certain counts particularly with respect to Mr. Greebel and
8 potentially with respect to other attorneys but he can't just
9 get up there and say Mr. Shkreli had a million attorneys and
10 therefore everything he did was blessed and everything should
11 be allowed to be considered as reliance of counsel. It is
12 legally improper.

13 And I think that the cases where these pretrial
14 hearings were held, *Scully* and *Atias* I think are the two ones
15 that are kind of the closest; you know, in some cases, in
16 *Scully*, for example, the Court ruled that the threshold
17 showing had been met and in *Atias* there was a difference, they
18 were distinguishing between different attorneys involved. So,
19 for some of those attorneys it had been met and for some it
20 hadn't and we're really just asking for that basic clarity
21 here.

22 I think, like I said, I think there's no question
23 that for Mr. Greebel on certain counts that showing may
24 potentially be there but for all of these other potentially
25 hundreds of attorneys and especially on the MSMB counts, it is

1 not clear from our own documents that that is something that
2 that threshold is going to be able to be crossed and that is
3 the reason that we have sought the hearing. And as we've
4 said, these are evidentiary issues that are going to have to
5 be decided at some point no matter what, either they are
6 decided prior to trial or they are decided when Mr. Brafman
7 gets up and makes his opening argument and we argue for a
8 limiting instruction or when there's cross-examination of a
9 witness and there's discussion of an attorney and there's a
10 question that suggests reliance and we have to have a side-bar
11 to find out what's the proffer of evidence to even ask that
12 question because obviously the witness's response will be
13 evidence.

14 So, it just makes sense given the complexity of the
15 case to at least address to the extent possible these
16 threshold issues before we get started so that things like
17 opening statements aren't implicated by them.

18 I'm just trying to see if there was anything else
19 that Mr. Brafman said.

20 THE COURT: He did raise a constitutional argument
21 that you were flipping the burden.

22 MS. SMITH: Right, and I think the constitutional
23 argument is clearly answered in our response. The burden of
24 guilt or innocence rests with the government, we embrace that
25 burden, it never shifts to the defendant. However, when the

1 defendant enters the courtroom, he is subject to the Federal
2 Rules of Evidence just as any other party is and when he is
3 affirmatively trying to put in evidence and he will be doing
4 that if he's advancing an advice of counsel defense, he is
5 responsible for meeting those basic evidentiary rules and it's
6 not the burden of guilt or innocence, it's the burden required
7 to get your evidence in.

8 THE COURT: The rule, as I recall it, speaks about
9 the need to establish a fact that would be necessary to admit
10 evidence. So, in terms of that paradigm in Rule 104, what
11 fact are you looking to have him establish and what particular
12 evidence, is it evidence of the elements that he needs to meet
13 to establish the advice of counsel and what sorts of facts
14 would you want to have a hearing on, I think the first one was
15 whether he consulted a lawyer with regard to some of the
16 charged conduct or all of the charged conduct; the second is
17 whether he truthfully disclosed to the lawyer the information
18 that the lawyer needed to render legal advice, I'm just trying
19 to understand the context of the rule.

20 MS. SMITH: I think some of the contours of this may
21 need to get worked out closer to the hearing so I don't want
22 to over-promise or overstate what needs to be provided to meet
23 that threshold because I think it will be fact specific. I
24 know one of Mr. Brafman's arguments is this is an unfair
25 preview of the defense and I think that we really are talking

1 about these kind of threshold issues.

2 So, one threshold issue is is there any evidence
3 that Mr. Shkreli consulted with any attorney before sending
4 out, for example, statements to MSMB investors that were
5 misrepresentations or omissions. That is a fact. If they
6 cannot make that factual showing, there is no way they can
7 introduce evidence that they relied on that attorney for that
8 particular conduct. That's an example I think of the kinds of
9 facts that the hearing would flush out. (Pause.) Yes, and
10 any attorney involved at all in connection with the MSMB
11 schemes.

12 One other thing I wanted to touch on was the
13 testimony of the defendant. You know, in a lot of the duress
14 cases and affirmative defense cases it is very clear that if
15 the only evidence of a particular fact is going to be the
16 defendant's testimony, there are no documents, there's no one
17 else's testimony, then it can be required at a pretrial
18 hearing for the Court to evaluate whether or not that
19 testimony is reliable and can meet kind of that factual
20 threshold. So, it will depend on how Mr. Shkreli wants to
21 proceed but there are instances in which he will if he wants
22 to advance certain evidence be required to submit an affidavit
23 or testify at a pretrial hearing.

24 MR. BRAFMAN: Your Honor --

25 THE COURT: One question I had was that, as we know,

1 in suppression hearings the statements of a defendant
2 generally aren't going to be admissible at the trial, right,
3 so what is the rule with regard to testimony of a defendant at
4 a 104 hearing, if you can tell me?

5 MS. SMITH: I believe it is similar, that it would
6 be for purposes of cross-examination or if a statement was
7 inconsistent later on as opposed to an affirmative statement
8 at trial. I believe it is the same standard but I will need
9 to double-check that.

10 THE COURT: All right.

11 MR. BRAFMAN: Your Honor, I think this is not about
12 Rule 104. Rule 104 is a discrete rule of evidence, as we have
13 laid out in our brief, that requires Your Honor to make a
14 ruling perhaps in mid-trial as to a discrete piece of evidence
15 that the defense or the government seeks to offer and then
16 there's a side-bar and there's argument. Rule 104 was never
17 intended to ask for a hearing on whether or not an advice of
18 counsel defense can be proffered. And I need to respond to
19 something else that was just said by the government.

20 THE COURT: May I address that, sir?

21 MR. BRAFMAN: Yes, Your Honor.

22 THE COURT: As you know, the Federal Rules of
23 Evidence don't apply only to trials, they apply to any
24 proceedings, civil or criminal, in federal court and I think
25 that the rule, although it does talk about being out of the

1 hearing of the jury, it doesn't foreclose me from having a
2 hearing prior to trial in order to determine whether certain
3 evidentiary burdens have been met. It is like a motion in
4 limine.

5 MR. BRAFMAN: Except in a criminal proceeding you
6 are running up against the constitutional right of a defendant
7 to rely on a presumption of innocence and not be required to
8 testify in a manner in which the government says they could
9 use it if he testifies at trial to cross-examine him. No
10 defendant should be required to make that statement to the
11 Court or to the government, but, Your Honor, the problem with
12 this case is from the government's perspective they see the
13 advice of counsel defense as if it applies, it applies only to
14 Count Six or Seven or Eight and not to the case-in-chief and
15 they can't pigeonhole it that way because the relationship
16 with Mr. Greebel covers the entire thrust of the indictment.
17 Yes, he wasn't the attorney of record when that statement went
18 out, however, if that statement went out and Martin Shkreli
19 lacked the criminal intent to defraud anyone and then after he
20 hires Katten he shares the information or they find the
21 documentation and they continue to deal with the very
22 investors who he is alleged to have defrauded, they can't say
23 Greebel has nothing to do with the MSMB count, the MSMB
24 investors are the people who are alleged to have had sham
25 consulting agreements and sham settlement agreements that

1 defrauded Retrophin and Greebel was the attorney of record
2 during all of this period.

3 THE COURT: That goes to the government's argument
4 that we shouldn't sever the trial, it is overlapping,
5 intertwined inextricably so that severing the trial doesn't
6 make sense.

7 MR. BRAFMAN: We can talk about the severance
8 issues --

9 THE COURT: We'll get to that argument later.

10 MR. BRAFMAN: -- in a minute but, Your Honor, with
11 respect to this argument that we are currently having, I think
12 what the government wants to do in its case-in-chief is to say
13 here's Exhibit A which we claim is fraudulent and therefore
14 Martin Shkreli is guilty of having defrauded the investor.
15 The investor in question is someone who then went on to settle
16 with Retrophin in a settlement agreement that Mr. Greebel had
17 worked on. And with respect to who the attorneys are, we
18 don't intend to argue that there was an independent
19 conversation with all of the Katten attorneys by Martin
20 Shkreli because we don't need that. The attorneys in Katten
21 who worked under Mr. Greebel were doing work he assigned to
22 them. Mr. Greebel was still in charge of the case and the
23 principal attorney and if we have crossed the threshold of
24 reliance on counsel on the Katten firm, then the other lawyers
25 working at Mr. Greebel's direction, he has a right to presume

1 that Greebel and those lawyers have worked together on this
2 project and I think that's an argument that we can present and
3 argue when and if it's appropriate.

4 THE COURT: What I think she's getting at, if I
5 understand her argument, is that Mr. Greebel wasn't retained
6 until the summer of 2012, was it?

7 MS. SMITH: 2011.

8 THE COURT: 2011 and that some of this conduct that
9 is charged in the other counts, Counts One through Six may
10 predate in some respect the retention of the firm and so the
11 government wants to know whether Mr. Shkreli is raising an
12 advice of counsel defense as to those earlier counts and if
13 so, which attorneys did he consult and for what aspects of
14 those counts, the charged conduct did he rely on the advice of
15 his counsel.

16 MS. SMITH: Your Honor, that's exactly correct and I
17 actually think Mr. Brafman is making my argument for me. The
18 fact that he just said that all of this stuff happened, then
19 they retained Katten, then later on they engaged in the
20 settlement and consulting agreements, that really does not
21 bear on the question of whether or not Mr. Shkreli consulted
22 with an attorney in good faith prior to making
23 misrepresentations and omissions to the MSMB investors
24 starting in 2009. So, this is the tension and this is the
25 concern, that you get up at opening and say Katten, Katten,

1 Katten and for some of the charged conduct you're never going
2 to be able to make out that reliance of counsel defense. We
3 certainly have not seen that evidence so far.

4 THE COURT: All right. Thank you.

5 MR. BRAFMAN: Your Honor, most respectfully, I don't
6 want to get into the discussion today and if we need to prior
7 to trial, there are other lawyers involved in part of the
8 process before Katten but at the end of the day, Judge, the
9 issue that I think the jury is going to have to decide is
10 whether or not Mr. Shkreli intentionally defrauded these
11 people and you don't make that decision based on a specific
12 piece of conduct at the time in question only.

13 We have a right to argue that when you look at all
14 of his conduct from the beginning until the end, that the
15 overwhelming evidence suggests that Martin Shkreli did not
16 intend to commit a crime and part of what the jury is allowed
17 to consider is the role that Evan Greebel played in counseling
18 him with respect to that specific conduct that he is charged
19 with that may have happened before he was retained but
20 nevertheless continues in a process of attempting to undo the
21 harm to these people which bears on the issue of did I intend
22 to defraud them or was I being too aggressive or was I using
23 poor judgment or was I acting with specific criminal intent
24 and I think you, Your Honor, need to really hear the evidence
25 before you can make this decision and if you want to be give

1 us certain restrictions in what we can and cannot say on
2 opening statement, we're willing to discuss that with Your
3 Honor and then you can make the decision after you've heard
4 the testimony as to what we can or cannot say and what Your
5 Honor will or will not do in a charging conference.

6 THE COURT: Are you intending to raise the issue of
7 Mr. Shkreli's lack of intent based on an advice of counsel
8 argument with regard to the charges where Mr. Greebel is not
9 included? His firm and Mr. Greebel didn't get involved in
10 representing Mr. Shkreli until after some of the charged
11 conduct regarding the MSMB entities, and I would like to
12 understand also whether you're making that argument or whether
13 you're just focusing it on the last two counts of the
14 indictment.

15 MR. BRAFMAN: No, we're not.

16 THE COURT: So, you intend to show that Mr. Shkreli
17 did consult with other lawyers regarding the conduct in the
18 first six counts?

19 MR. BRAFMAN: We're mixing apples with oranges, I
20 want to focus on Greebel.

21 THE COURT: I know but Mr. Shkreli is charged in all
22 the counts.

23 MR. BRAFMAN: Yes.

24 THE COURT: I'm just trying to understand how far
25 back or how extensive your defense is being raised.

1 MR. BRAFMAN: Your Honor, if you look at the
2 indictment, they may have chosen two specific counts to charge
3 Mr. Greebel in but our argument shows and we can show that
4 through extensive documentation that he's in the process, in
5 the mix way before the counts that they charge him
6 specifically in.

7 So, the fact that he's only charged in those two
8 counts is a decision the government made but if they had
9 wanted to involve him in a conspiracy from the moment he
10 became Martin Shkreli's lawyer and began to work with him,
11 they could have done that if they wanted to under the facts of
12 this case. So, the fact that they made the discrete decision
13 not to charge him in those crimes, he's certainly involved and
14 he's involved throughout the period of negotiations and part
15 of what we have to deal with in this case is not just the
16 statement in 2009 as to whether he did or did not have
17 \$35 million in assets under management and the government
18 hasn't I don't believe -- Your Honor perhaps has read the
19 Wells submission that was put in by Arnold & Porter, but they
20 had an expert opine on why that was not a false statement
21 given the state of affairs going on at MSMB at the time. So,
22 it is not black and white that throwing out that piece of
23 information he committed a crime. And then for the duration,
24 Your Honor, in '11, '12 and '13 and '14 Evan Greebel is
25 intimately involved in every decision Martin Shkreli makes and

1 those decisions are going to be used against Martin Shkreli,
2 the decisions he makes while represented by Evan Greebel are
3 going to be used to prove in their view why this is a fraud
4 and I think we have a right to defend against it and whether
5 it's partially reliance on counsel and partially on the issue
6 of criminal intent, you can decide once you've heard the
7 testimony what you will charge this jury at the end of the
8 trial but doing it in a hearing is almost impossible, it's
9 almost impossible because you need to put the government
10 witnesses on the stand so that you will also hear the
11 testimony from the people we are alleged to have defrauded how
12 their attorney communicated with Mr. Greebel and they relied
13 on the advice of their own counsel in entering into the
14 consulting agreement or the settlement agreement. Now, they
15 may not have told the government that but we have
16 correspondence and the one arbitration that was resolved was
17 resolved in our favor in the Rosenfeld arbitration. So, this
18 is not as clean cut a case as the government alleges.

19 (Continued on next page.)
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1 MS. SMITH: Your Honor, just two quick points.

2 So once again, the settlement proposal agreements
3 are only to Count Seven for Retrophin.

4 And then with respect to Mr. Greebel, it is true
5 that he's not charged in the first six counts. I actually
6 agree with Mr. Brafman's statement that he was involved in
7 MSMB and involved in some of the conduct; for example, he
8 backdated his documents to create an interest for MSMB Capital
9 in Retrophin. However, that is distinct and separate from the
10 question of whether or not he was consulted with respect to
11 misrepresentations and omissions actually charged in the first
12 six counts. So I think that's our point.

13 THE COURT: All right, well, let's do this: I think
14 what we should do, I know there's outstanding discovery
15 related to outstanding issues on this point.

16 Privilege, have the defendants and the government
17 been able to resolve with the Retrophin and the outstanding
18 issues regarding privileges, or is that still under
19 negotiation?

20 MS. SMITH: Your Honor, the government's
21 understanding, we have not been involved, is that there are
22 still a few issues that the defendants are going back and
23 forth with Retrophin on with respect to Retrophin's privilege.

24 THE COURT: All right, and the MSMB privilege has
25 been waived.

Proceedings

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1 MS. SMITH: The MSMB privilege has been waived.

2 THE COURT: And Mr. Shkreli has waived his privilege
3 as well. All right.

4 So if we're going to have a hearing, let me hear
5 from the defendants, if I think it's necessary, after seeing
6 Mr. Shkreli's submissions, we'll schedule that at a time after
7 the 3500 material has been provided and before -- hopefully
8 substantially before trial.

9 MS. SMITH: Your Honor, again, we would object to
10 any ex parte submission. Your Honor cannot actually make a
11 substantive ruling without actually sharing with us, and I
12 don't see any reason for the defense to be able to preview and
13 prejudice the Court by providing its submission early, and so
14 again, if the objection is the compilation -- the specific
15 selection and compilation of documents, then we should just
16 wait until the time of the hearing and they can make their
17 pitch then. I don't see that there's any basis to actually
18 submit the documents now and to not have us to be able to
19 respond.

20 THE COURT: But I will say it helps me to hear from
21 all the parties, not just one side. I just favor ex parte
22 submissions.

23 MR. AGNIFILO: I'd like to make one point clear and
24 draw a distinction. In all of the research I have done, and
25 God knows the last five days, I have never seen an issue

1 raised that we raise in our point three of our recent
2 submission and the issue there is the burden shift, in the
3 context, Judge, of a defense that as the prosecution has said
4 is basically a subset of the defense of lack of criminal
5 intent, which is not a defense at all, and that's actually the
6 point.

7 So we keep talking in terms of an advice of counsel
8 defense and I think it's a shorthanded way of saying
9 something, but it's not an independent defense, it's a subset
10 of the fact that someone would have good faith, or there would
11 be no criminal intent. And I've never seen the issue raised,
12 and I think the constitutional point that I think that we're
13 starting to flirt with here, is we are now in a position of
14 having to come forward in the first instance to provide
15 evidence of Mr. Shkreli's lack of intent because that's --
16 when we talk about -- first talk about the advice of counsel
17 defense, they're talking about in the context of a jury
18 charge. So what you're really saying is has all of the
19 evidence in the trial passed the threshold level that the
20 defendant gets the jury charge. It's not an independent
21 defense, and that's why it's different than a duress defense.

22 A duress defense is I admit that I committed all the
23 elements of the crime. In the Dickson case, the person bought
24 a gun but said I bought the gun because I was under duress and
25 I was afraid. In the first Supreme Court case, the Bailey

1 case, I ran away from prison, I admit that I ran away from
2 prison but I was afraid.

3 So you're admitting all the elements of the crime,
4 and there's a defense that exists outside the elements of the
5 crime that courts have said you can put that onus on the
6 defendant because it's not an element of the crime. And
7 that's the distinction. Here, it's not a standalone defense,
8 it's baked into intent.

9 So my concern, and I pulled all the Pacer motions of
10 all the other cases, and there are constitutional objections
11 raised, but not this one. And this one is really sort of an
12 In Re Winship; you know, the government bears the burden of
13 production and proof on every element of the crime. I've
14 never seen it raised. And I think here we're flirting with a
15 constitutional line if -- and I understand from a practical
16 standpoint, I really do, why Your Honor wants this
17 information, you want to make the trial easier. We want to
18 make the trial easier. But I don't think we can make the
19 trial easier this way. And what I mean by "this way," is
20 having Mr. Shkreli say here's why I don't think I had the
21 intent to commit a crime, because I thought it was true. I
22 thought it was valid. I spoke to a lawyer. Because that's an
23 element of the crime. And we never go first, when it's an
24 element of the crime. So I think -- I think that's important
25 here, and I'm -- I understand Your Honor's concern, and what

1 I'd like to do, if possible, is see if we can solve it another
2 way. We talk. We get along fine. They don't surprise us.
3 We're going to get along much better once Winston leaves, but
4 we get along fine, Judge.

5 If we can solve this another way, we'll try to solve
6 it, but I don't think an affidavit from the defendant in a
7 criminal case about why he doesn't have the intent is the way
8 to solve the problem.

9 THE COURT: Well, my concern, I wasn't trying to put
10 Mr. Shkreli in a position where he's having to waive his Fifth
11 Amendment right and shift burdens to him, because I understand
12 that the government has the burden and you have the absolute
13 right not to submit any statements at all, but my concern was
14 just having an attorney submit an affidavit on issues that
15 require personal knowledge. I didn't see how Mr. Brafman was
16 going to do that, just given the elements of the advice of
17 counsel defense. So I just wanted to him to think about it.
18 I'm not saying Mr. Shkreli should give an affidavit, you may
19 decide to try to make your pitch, you know, without. But I do
20 think I have to think about those elements in the context of
21 the person who's asserting it.

22 All right, are we ready to talk about severance now?

23 MS. SMITH: Yes, Your Honor.

24 MR. CHAN: Your Honor, on this last issue before we
25 go on to severance, I did want to make just two points.

1 Up until today, I think we were a little bit
2 confused about the government's submission as to this hearing
3 and the question of whether or not a codefendant can assert a
4 advice of counsel defense. Frankly, I thought we were in a
5 parallel universe where the government was saying that they
6 have to make some showing and that there was advice of counsel
7 defense as to our client, when I thought that was pretty
8 clear. Whatever threshold the Court decides needed to be met,
9 I thought that that threshold was supremely met, even after
10 the government called our -- described this relationship as an
11 attorney/client relationship, has referred to our client as
12 the attorney for Mr. Shkreli, and the press release has called
13 it that, so I was confused as to why there was this demand.

14 THE COURT: Your client has taken the position that
15 he did not represent, and the firm did not represent
16 Mr. Shkreli, but rather they represented MSMB and Retrophin
17 so --

18 MR. CHAN: No, I agree.

19 THE COURT: -- it's still not entirely clear to me.
20 I think there are engagement letters between the Katten firm
21 or Mr. Greebel and MSMB and Retrophin, but there is not an
22 engagement letter, from what I've been told in the
23 submissions, between Mr. Greebel and Mr. Shkreli or for
24 Mr. Shkreli.

25 MR. CHAN: I agree. But insofar as the counts that

1 our client is charged in, I didn't see why this would be an
2 issue and particularly raised a question, because it seemed to
3 me that the government was seeking to link this hearing with
4 the severance motion. And to the extent that there was going
5 to be argument that severance -- a decision by the Court on
6 the severance should be delayed until after resolution of
7 these various issues in this hearing, I think that's why we
8 thought why is there a question as to our severance motion,
9 whether or not our argument that we have mutually antagonistic
10 defenses with our codefendant, in some way turn on a hearing
11 to demonstrate that, in fact, would be mutually antagonistic
12 defenses. I thought it was clear that we were going to argue
13 that in the attorney/client relationship that existed as to
14 Retrophin, that there were lies made to one side, that's our
15 position, and our codefendant's position is that they made
16 full and fair statements to our clients about those issues.

17 So what I hear from today, and I wanted to just make
18 this clear, that the government is not challenging that aspect
19 of our codefendant's assertion of the advice of counsel
20 defense and so, therefore, our severance motion, until before
21 you decide, if that's different, then I think we should have a
22 discussion about that, but I just wanted to raise that point.

23 THE COURT: Do you want to respond, Ms. Smith?

24 MS. SMITH: I don't think we're linking the two,
25 Your Honor. I mean as I said, you know, without conceding

1 anything, I think to the extent there is an advice of counsel
2 defense here, Counts Seven and Eight, Mr. Greebel that's kind
3 of what we see as the most likely universe-based delivered
4 threshold of showing, we're going to discuss it. I don't see
5 any reason to hold up the severance motion. We were frankly
6 very confused that Mr. Greebel decided to respond to a motion
7 that hadn't been directed at them and there was not any
8 suggestion in our motion that this somehow changes the
9 antagonistic defenses at trial.

10 I think, you know, even separate and apart, and
11 Mr. Brafman's made this point, from the specific advice of
12 counsel defense, the reliance of counsel, there is also going
13 to be lots of other evidence kind of in that realm and so
14 we're not making an argument that there should be any
15 different position with respect to the -- you know, position
16 taken on the antagonistic defenses or that the severance
17 motion shouldn't go forward.

18 MR. BRAFMAN: Can I just say one thing in response
19 to the Court's observation about the retainer agreements. It
20 is our position that whether or not if you are an owner of a
21 company or a member of the owner -- ownership of the company
22 or founder of the company, the fact that a law firm has a
23 retainer agreement with the company, does not preclude you
24 from being the client of that attorney as well, because in the
25 correspondence between Evan Greebel and Martin Shkreli, Martin

1 Shkreli is introducing Evan Greebel as his lawyer to other
2 lawyers who are working to resolve issues. So the
3 nonexistence of a retainer agreement between Mr. Shkreli
4 personally and Mr. Shkreli's company personally is not
5 dispositive on the issue as to whether or not Evan Greebel was
6 acting as Martin Shkreli's lawyer, because Evan Greebel is
7 clearly giving Mr. Shkreli personal advice, but maybe advice
8 that is on behalf of the Retrophin company, but it certainly
9 impacts on what Shkreli is doing. And the fact that the
10 company pays the fees is not dispositive of who the client is
11 either.

12 THE COURT: No, I understand. I was just noting
13 Mr. Chan's statement that Mr. Greebel was Mr. Shkreli's
14 attorney, which was something that was contra to the position
15 being made here.

16 MR. BRAFMAN: Thank you.

17 THE COURT: All right, so Mr. Brodsky?

18 Mr. Brodsky is out --

19 MS. RUBIN: I thought we would go first in
20 severance, but if he wants to go first.

21 MR. BRAFMAN: Whatever Your Honor wants.

22 THE COURT: Do I ask, Mr. Brafman.

23 MR. BRAFMAN: No, I'd like to do it.

24 THE COURT: Okay.

25 MR. BRAFMAN: Thank you.

1 Judge, I think the decision by Judge Spatt, although
2 a district court judge like Your Honor, and obviously I am not
3 in a position to have his case control Your Honor's
4 discretion, I think demonstrates quite clearly why a severance
5 in this case is required. And first, and perhaps very
6 important, is the significant response that we always get from
7 the government when a motion for a severance is made is that
8 it will constitute a waste of judicial resources, it will
9 require two long trials instead of one long trial.

10 Your Honor, a trial of Mr. Shkreli alone, given the
11 submissions by Mr. Brodsky on behalf of Evan Greebel, a trial
12 of Mr. Shkreli alone will be much easier, much cleaner and
13 much quicker than a trial of Mr. Shkreli and Mr. Greebel, who
14 I think we'll spend half the day at sidebar discussing
15 limiting instructions that Mr. Greebel wants every time we, in
16 cross-examination, raise Mr. Greebel's name.

17 I think if ever there was a case, like the case
18 before Judge Spatt, the Aronson case, where there is mutually
19 antagonistic defenses that cannot be reconciled, it's this
20 case. And the decision that the courts look at is if in order
21 to relieve one defendant's defense the jury must reject the
22 other defendant's defense, then a severance is required. And
23 those courts who have denied that motion were ultimately
24 reversed for the reasons set forth in those respective
25 opinions.

1 Mr. Greebel in his papers -- and one thing I want to
2 assure the Court as a sidebar just for a moment since it's
3 unfortunately in the papers, I represent to Your Honor as an
4 officer of the court whose probably tried 25 cases to verdict
5 in this building, that there will be no disruption of these
6 proceedings by Mr. Shkreli. He's not going to do anything to
7 undermine the integrity of these proceedings, as Mr. Brodsky
8 warns. And I promise you, this case, if Mr. Shkreli goes to
9 trial alone, will have substantially less disruptions and less
10 difficulties than if we have a joint trial. So I just want to
11 make sure that Your Honor understands that, because I was
12 taken aback by some of their arguments.

13 So purely on legal grounds, purely on legal grounds,
14 it is impossible to reconcile the defenses in this case. And
15 whether you charge a -- whether you ultimately charge an
16 advice of counsel defense on two counts or all counts or on no
17 counts, it's still an impossible trial because they are going
18 to take the position from the onset that Mr. Greebel did
19 nothing wrong, that Mr. Greebel was -- that Mr. Shkreli lied
20 to him, that Mr. Greebel is among the people who were
21 defrauded by Mr. Shkreli. So it's impossible, Judge, in that
22 atmosphere for us not to then have to attack Mr. Greebel as
23 not giving Mr. Shkreli the correct advice, as helping
24 Mr. Shkreli participate in the fraud. So at the end of the
25 day, if the jury accepts their claim that Mr. Greebel was

1 deceived, then they must convict Mr. Shkreli for, among other
2 things, deceiving his own lawyer.

3 If on the other hand we take the position that
4 Shkreli did not -- that Greebel is responsible for a fraud, if
5 there is a fraud, and that his advice was not only inaccurate
6 but it was, in effect, him either willingly or unwillingly or
7 implicitly participating in fraudulent conduct, then he gets
8 convicted.

9 And I also submit, just as a practical matter, and
10 then I'm going to stand on our written submissions because I
11 think they lay this out, unless Your Honor has specific
12 questions, but as a practical matter, if we have a trial with
13 Evan Greebel, there will be a lot of evidence that they will
14 attempt to introduce in order to dirty up Mr. Shkreli that at
15 his own trial the government could never introduce. And at
16 the end of the day --

17 THE COURT: Well, give me an example and tell me why
18 it wouldn't be admissible.

19 MR. BRAFMAN: Excuse me?

20 THE COURT: I said give me an example of the kind of
21 evidence that you suspect Mr. Greebel to introduce that the
22 government would not be able to introduce that would attempt
23 to cast dispersions on Mr. Shkreli.

24 MR. BRAFMAN: Well, if Mr. Shkreli wants to testify
25 on his own behalf, they would attempt to cross-examine him

1 with matters that may go to his credibility that may not be
2 relevant to the crimes charged, but which they may have a
3 right to cross-examine with him about his credibility which
4 the government may not on a 403 balancing test.

5 THE COURT: But do you have an example that you can
6 point to? Because I know that there a lot of theoretical
7 arguments being made about the sort of adverse scenarios that
8 may occur if they're tried together, but not much on the
9 specifics.

10 MR. BRAFMAN: But the government -- the affidavit of
11 Lisa Rubin lays out a litany of arguments that they have made
12 which would undermine Mr. Shkreli's presumption of innocence
13 separate and apart from anything that the government may
14 introduce in this courtroom. And they would take the position
15 that Mr. Shkreli is reckless, that the conduct he has
16 demonstrated throughout his life shows you how reckless he is
17 and as a result you should understand that Evan Greebel was
18 dealing with someone whose conduct was so reckless and so
19 continuously reckless during the period in question that you
20 cannot rely on anything he says, and any claim that he told
21 Greebel what the facts are is a lie by the fact that Martin
22 Shkreli has no credibility with respect to the way he conducts
23 his life. And they have provided Your Honor with example
24 after example of conduct that they claim that they could
25 introduce on the issue of Mr. Shkreli's credibility.

1 Now, I don't think on a 403 balancing test the
2 government gets a lot of that in, but on a 403 balancing test,
3 you're doing a different balancing act when you're deciding
4 whether it's relevant to Mr. Greebel's defense, not to the
5 government's case, whether it's relevant to Mr. Greebel's
6 defense. And as a consequence I have to attack Mr. Greebel,
7 and they have to essentially attack Mr. Shkreli. And I was
8 taken aback by some of the things they said. But if they are
9 on trial alone, they may well be able to introduce that
10 evidence to demonstrate to the jury why Greebel is the honest
11 lawyer just billing away and Shkreli is the crazy person who's
12 taking Greebel down the road where he would never ever go
13 down. If we're on trial together, I have to show that Greebel
14 is the fraudster, if you will, and among the victims of the
15 fraud on Martin Shkreli in person. So I think we have
16 attention in this case that I don't think is reconcilable.

17 I also point out that the government's faced with
18 the decision that they can sanitize, if they want to use the
19 post-arrest statement by Mr. Greebel, sanitize that statement
20 to avoid Bruton issues. It's conceptually impossible.
21 Because the statement from the beginning to the end, as far as
22 I'm concerned, is a lie. And if the government doesn't
23 introduce it, if there is a joint trial, and if they attack
24 Shkreli, I might introduce it as a 806 prior inconsistent
25 statement by Shkreli, even though normally an admission after

1 trial -- after arrest is only admissible by the government as
2 an admission and otherwise a hearsay statement.

3 If Greebel in that statement takes the position that
4 he didn't do any of the things that I, for example, can show
5 he did, that's an 806 prior inconsistent statement and it
6 comes in as my evidence and they can't stop it and neither can
7 the government. So it's an argument that's -- and I've given
8 this a great deal of thought and I believe I'm right and when
9 you look at 806, it provides, and if the government uses
10 evidence against Mr. Shkreli by Evan Greebel, for example, and
11 they say it's a coconspirator statement or a statement of a
12 codefendant and, therefore, it's admissible, I have a right to
13 use that statement if I want to. But, Judge, that statement
14 cannot be sanitized by them.

15 So I don't know whether I need to use it or not, but
16 if I use it and Evan Greebel is on trial, they are going to
17 claim it's not admissible or it shouldn't be used. So I think
18 the issues in this case that Your Honor's going to have to
19 confront and digest and rule on in the joint trial are not
20 necessary.

21 THE COURT: Well, I think that much of the evidence
22 that's going to be admissible at a joint trial will also be
23 admissible in a separate trial. And that's somewhat of the
24 difficulty with the argument that you make as though
25 Mr. Greebel and Mr. Shkreli are going to have different

1 abilities to present evidence or to present evidence if
2 they're tried separately, I'm not sure that you're correct
3 about that --

4 MR. BRAFMAN: But, Judge, if you look at --

5 THE COURT: -- more specific examples.

6 Look, I don't even -- I think you're worried about
7 some of these examples of Mr. Shkreli's statements throughout
8 his life or the conduct. I don't even see how that's going to
9 be relevant.

10 In terms of the fear that Mr. Shkreli will disrupt
11 this trial, I see no reason to think that he would do that.
12 He's demonstrated nothing but appropriate conduct throughout
13 all of his appearances here. And, you know, he's entitled to
14 his opinions. I think you as his attorney would be
15 responsible for counseling him about the downside of making
16 certain kinds of statements or engaging in certain types of
17 conduct, but I don't control his conduct right now outside the
18 courthouse as long as it's not having an adverse impact on the
19 proceedings before me. But I have no reasonable to think that
20 Mr. Shkreli would do anything that would impact adversely on
21 the proceedings.

22 MR. BRAFMAN: And he will not, but the effort by the
23 Greebel counsel to bring those to the attention of the Court
24 shows how this trial is going to ultimately play out where
25 they are going to use every resource available, and perhaps

1 some of it won't be admissible, but in their opening statement
2 they are going to call Martin Shkreli a liar. And in the
3 opening statement, they are going to take a position that's so
4 irreconcilable and so antagonistic to the defendant that I'm
5 going to have Gibson Dunn as a third prosecutor in the case.
6 And the difficulty in the case, is as Judge Spatt concluded,
7 is that if an order to believe the defense of Defendant A you
8 must disbelieve the defense of Defendant B, that a severance
9 is the appropriate remedy.

10 And I do not think that a separate trial, a Shkreli
11 and a separate trial in Greebel, will take more time than a
12 joint trial. I really think that we are going to spend half
13 the day arguing legal issues presented at a joint trial that
14 will not presented at a separate trial.

15 THE COURT: Did you want to address any of this
16 notice that the government sets forth at page 28 of their
17 memorandum in opposition where they dispute your argument that
18 these all lead to antagonistic defenses, they present a number
19 of standards where a jury could conclude that Mr. Shkreli's
20 defense is credibility but also acquit Mr. Greebel because the
21 government hasn't proven intent.

22 There are a number of scenarios where they argue
23 that the jury would not necessarily have to convict one
24 defendant if they believe the other.

25 MR. BRAFMAN: Your Honor, the reason why those cases

1 are distinguishable is because the Greebel briefs make it very
2 clear that they do not intend to defend this case on the
3 merits, they intend to defend this case by saying the one who
4 is guilty is Martin Shkreli, and Evan Greebel was a lawyer who
5 was misled by this boy genius, even though Greebel is the
6 sophisticated lawyer.

7 If their defense was we intend to defend this case
8 on the merits and not attack Martin Shkreli, I'm not certain
9 that we're having this conversation. But they have taken the
10 position from the beginning that because we may intend to rely
11 in some respect on a Greebel advice, that they then must call
12 Martin Shkreli a liar to sort of undercut the integrity of
13 that defense.

14 So I think perhaps I should sit down and let
15 Mr. Greebel explain how he intends to defend this case.
16 Because if they were to take the position that both defendants
17 are not guilty, I think we're having a different dialogue.

18 THE COURT: Yes, Mr. Brodsky.

19 MR. BRODSKY: Yes, Your Honor. Thank you, Your
20 Honor.

21 We've been quietly listening, Your Honor, and
22 Mr. Brafman has made a series of misstatements regarding our
23 client and it's just representative of what's going to happen
24 at a trial.

25 Your Honor, we have looked and searched wide in all

1 federal court and all the state court cases, every single one
2 that's published, and we even looked for unpublished ones, and
3 the only scenario we have ever found where a lawyer and a
4 client or a client representative was charged together in a
5 crime, and the lawyer accused the client or the client
6 representative of deception and lying and fraud and material
7 omissions, and the client or client representative said they
8 acted in good faith in part because their communications with
9 their lawyer showed they would have never committed the crime
10 if they were communicating with their lawyer, there is only
11 one case, and that was Aronson. And the government in that
12 case argued against severance and they lost, and they
13 criticized --

14 THE COURT: What did they originally say? He sat on
15 reconsideration and changed his decision.

16 MR. BRODSKY: Correct. Originally it was just a
17 spill over prejudice argument. And when the counsel for
18 Mr. Aaron, the lawyer, came forward to Judge Spatt and said I
19 have evidence that Aronson, the CEO of the entity that Aaron
20 was representing, is actually going to assert a reliance on
21 the advice of the counsel defense, because Aronson wasn't
22 doing what Mr. Brafman's doing, which is making it very clear
23 that's his intent, Aronson actually said nothing for
24 severance. But there was some papers filed in connection with
25 a parallel SEC proceeding, and so Aaron then asked Judge Spatt

1 to reconsider and focus on what we ask Your Honor to focus on,
2 which is the mutually antagonistic defenses. And when he did
3 that in a 16-page opinion that did go into deal about cases
4 and was thorough, and but no account should be criticized as
5 not being a thorough, thoughtful opinion, he found what is the
6 only logical conclusion to draw, that this is of a rare sort
7 of case where you have two defendants that will go at each
8 other's throats.

9 I promise you, Your Honor, we will open in this
10 courtroom and we will say in our opening statement
11 Mr. Shkreli's a liar and a deceiver, and we will prove it and
12 we are -- I'm going to take you through Your Honor specific
13 examples. And Your Honor asked for examples in which we will
14 prove the case that Mr. Shkreli's a liar that the government
15 doesn't know about, and I will give you an example of that.
16 And it's just one of many examples. Because the government
17 never spoke to Mr. Greebel before they indicted Mr. Shkreli
18 and Mr. Greebel. And had they done that, maybe they'd have
19 this information. But the information of Mr. Shkreli's lies
20 and his deceptions, for a large part of it, lie in our
21 possession here and not in the government's possession, and we
22 are going to show it.

23 So the problem here, Your Honor, is in the rarest of
24 circumstances, we have a situation where we are going to get
25 up and we are going to say Mr. Shkreli's guilty, and that

1 distinguishes this case from all others, except for Aronson.
2 There was one other decision, actually two other decisions we
3 found. The government doesn't cite a single decision in their
4 support in this circumstance, but there was two other
5 decisions we found that were similar to Aronson. They're not
6 squarely on all fours like it is in Aronson.

7 Just as in Aronson, Aaron, the lawyer, represented
8 the entity, just as Mr. Greebel represented Retrophin and
9 MSMB. And Mr. Chan, my colleague, when he was speaking, I
10 think the Court may have misunderstood him, because he was not
11 saying that Mr. Greebel ever represented Mr. Shkreli in his
12 personal capacity, he was saying that was the government's
13 statement. The government indictment included that, the
14 government's press release said that, but the government is
15 dead wrong. They are absolutely wrong. The engagement
16 letters reflect that Mr. Greebel did not represent
17 Mr. Shkreli. And I know Mr. Shkreli's going to argue
18 differently. I know his very abled counsel is going to argue
19 differently, and they're going to look at emails and interpret
20 them differently. But we are definitely not going to argue
21 that. We are going to argue we represented Retrophin and we
22 represented MSMB.

23 But going back to my point, there were with other
24 cases we found. One was W.R. Grace, which is out of the
25 District of Montana. And when I say we searched wide and far,

1 we did, Your Honor, we went to the District of Montana cases.
2 And W.R. Grace, which is a multipage, complicated opinion with
3 many, many defendants, at the end said that Defendant Stringer
4 was a lawyer and Stringer was going to assert that the other
5 codefendants were wrong, that he was in-house counsel and he
6 was going to say the other codefendants, what their defenses
7 were were incorrect, were wrong and there was adversity and
8 mutual antagonism, and so Stringer was severed, the attorney
9 was severed.

10 The other third case we found was the Mark Bellman
11 case. You may remember Tyco executives were charged with
12 crimes, and the government also charged Mark Bellman and
13 outside counsel with crimes. But what the government did in
14 that case was they separated the indictments. They never
15 charged Mark Bellman with the Tyco executives. And that's
16 what should have happened in this case but it didn't.

17 Why it's so rare Your Honor, is that in this case,
18 it is going to be extraordinarily difficult for either
19 Mr. Greebel or Mr. Shkreli to get a fair trial when we are
20 going to allege he's guilty. Unquestionably, Mr. Brafman is
21 going to argue our client is the actual deceiver, once we do
22 that. And then every piece of evidence, every witness will be
23 cross-examined with that in mind. Every cross-examination
24 will take longer, every opening statement will take longer.
25 We will have to call witnesses we wouldn't in a trial without

1 Mr. Shkreli to undermine and undercut Mr. Shkreli's
2 credibility. We will cross-examine Mr. Shkreli, should he
3 take the witness stand, with not just, not just the waived
4 privileged documents from MSMB and Retrophin, but we are going
5 to cross-examine him with all the information, the
6 confidential information that Mr. Shkreli conveyed about his
7 life and about who he is as a person and about anything else
8 that he did at Retrophin and MSMB when he was talking to
9 counsel for MSMB and counsel for Retrophin, Mr. Greebel, and I
10 submit to Your Honor --

11 THE COURT: So your expert's affidavit that you
12 provided recently simply raises the issue of Mr. Greebel's
13 ability to do that because of attorney/client confidences is
14 really not correct, right, because Mr. Shkreli has waived his
15 privilege and Mr. Greebel would be free to reveal those
16 confidences, as you just asserted he would, or elicit having
17 this recording what would otherwise be protected by the
18 attorney/client privilege, but your expert's affidavit relies
19 in part on the ethical obligations that Mr. Greebel might
20 still withhold.

21 MR. BRODSKY: Mr. Greebel has learned things outside
22 of MSMB and outside of Retrophin. Remember Mr. Greebel was
23 representing Retrophin and MSMB over a long period of time.
24 Retrophin has not waived the privileges to everything. They
25 waived the privileges to a series of narrow areas. But there

1 are other areas of representation where we learned information
2 where the privilege has not been waived. And the MSMB is a
3 similar situation. We waived all his privileges to MSMB, but
4 those documents don't contain all conversations. And so when
5 Your Honor asked a very wise question, whether the
6 government -- whether Mr. Greebel will have evidence that the
7 government doesn't have, I respectfully submit we will.

8 Let me give you an example. I will try to be
9 general because, Your Honor, we have a constitutional right,
10 and in footnote 2 of our principle motion, we lay out the case
11 law for it. We have a constitutional right not to reveal all
12 our defenses.

13 THE COURT: But isn't there reciprocal discovery
14 obligations? Shouldn't they be providing at least documents
15 to the government? They have served requests on the defense
16 for reasonable discovery.

17 MR. BRODSKY: Sure. We had documents --

18 THE COURT: So you are going provide those
19 documents.

20 MR. BRODSKY: I'm glad you raise that, Your Honor.
21 Defendant always has reciprocal discovery obligations, if they
22 intend to call witnesses affirmatively in their defense, and
23 they have documents in their possession, they should
24 affirmatively show them. Right now we have not -- and we're
25 not sitting on documents, and the defense does not have an

1 obligation to disclose to the government what's in Mr. Greebel
2 head and the information he has.

3 THE COURT: We're not talking about that, we're
4 talking about documents that you just talked about that you
5 were going to present those at a trial.

6 MR. BRODSKY: Correct.

7 THE COURT: I think whether or not Mr. Greebel is
8 tried separately or together with Mr. Shkreli would intend to
9 present documents that the government hasn't yet seen, and my
10 question is a very simple, when are you going to provide those
11 documents?

12 MR. BRODSKY: If we have documents --

13 THE COURT: You said you did.

14 MR. BRODSKY: What I meant, Your Honor, I'm sorry,
15 let me be clear. The documents we intend to introduce and
16 cross-examine Mr. Shkreli about came in the discovery from the
17 government. And what the government produced was information
18 that they probably do not understand or realize with
19 respect -- because Mr. Greebel represented Retrophin and MSMB,
20 he has knowledge in his possession regarding communications
21 that the government doesn't have. We have identified records
22 that Mr. Shkreli, for example, submitted to the SEC that are
23 false.

24 The government has never identified them. We don't
25 believe the government knows about them. We have been able to

1 identify them because for a period of time from -- you may
2 remember the deputy general counsel of Katten came in here and
3 said it started in or about mid-2013, Katten started
4 representing MSMB and representing Martin Shkreli before the
5 SEC, there was a partner who was a former federal prosecutor
6 from the Southern District of New York, and quite a capable
7 and brilliant lawyer, starting representing Mr. Shkreli in
8 connection with producing documents to the SEC starting in
9 about mid-2013. And we have identified documents that we know
10 based on the communications between Katten and Mr. Shkreli and
11 MSMB that were fictitious. We will cross-examine Mr. Shkreli
12 about it. The government, we believe, have no reason to
13 believe that they know about them.

14 We also believe that we can prove Mr. Shkreli
15 engaged in trading that was illegal. Now, we don't believe
16 the government knows about that. It's not a charged crime.
17 But undoubtedly, if Mr. Shkreli takes that stand and he takes
18 the position, which his defense will be, that he acted in good
19 faith when he communicated with Mr. Greebel, he will
20 cross-examine him about his trading. And we will show that
21 his trading in certain respects was not lawful, and that will
22 undermine his credibility. But that's evidence the government
23 will be unable to obtain, because Mr. Greebel, they can't talk
24 to Mr. Greebel.

25 And, Your Honor, I want to back up one step.

1 Besides additional evidence that we intend to offer that the
2 government doesn't have that will come out in
3 cross-examination, the case law is clear, if there's mutual
4 antagonism, genuine mutual antagonism, I'm not talking about
5 finger pointing, which is all the cases when you see finger
6 pointing where two defendants get up and say, hey, I'm
7 innocent, I don't know what's in that bag, I never knew. And
8 the codefendant in Zafiro says, hey, I didn't know what was in
9 this bag, that was his bag. And both say I never intended to
10 commit a crime and I don't know what's in the bag. That's two
11 defendants who are saying I'm innocent and that bag's not
12 mine. But they're not saying their codefendant is guilty, and
13 they're not saying their codefendant is a liar and a deceiver.

14 This is the extraordinary rare incident where we
15 will, and where defenses are generally mutually
16 irreconcilable, where if they accept our defense, I don't see
17 how the government can argue, if they accept Mr. Greebel's
18 defense that Mr. Shkreli's a liar and a deceiver, and that he
19 lied about the assets under management at MSMB, and they
20 ignored completely the government's evidence, they don't
21 believe the government's witnesses, but they believe our
22 evidence, they will find Mr. Shkreli guilty of crimes.

23 And that is classic quintessential, and that's
24 exactly the words that Judge Spatt used, quintessential
25 antagonism between two defendants. And, Your Honor, I

1 understand the case law and I recognize that there's a default
2 in favor of joint trials. There's a default in the sense of
3 judicial economy. There's a default that says, look, the
4 government's evidence is principally going to be the same
5 against Mr. Greebel and Mr. Shkreli, so why shouldn't we have
6 one trial? Why shouldn't we just allow the witness -- why
7 should we allow a witness, Mr. Rosenfeld, for example if they
8 call him, why shouldn't we have Mr. Rosenfeld testify at one
9 trial and then another trial? Why should that be? We should
10 we have any government agent stand up in one trial and another
11 trial?

12 (Continued on next page.)
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1 MR. BRODSKY: But the Third Circuit I thought put
2 it best in the United States versus Bacha. And certainly the
3 Supreme Court has said it, Justice Stevens said it in his
4 concurring opinion in *Zafiro*, quote, no defendant should ever
5 be deprived of a fair trial because it is easier or more
6 economical for the government to try several defendants in
7 one trial rather than protracted multiple trials. W.R.
8 Grace, at the end of the decision, said the same thing. That
9 fundamentally, at the end of the day judicial economy, when
10 it bumps up against due process and fairness, due process and
11 fairness wins.

12 THE COURT: What fundamental trial right do you
13 believe is going to be comprised by the joint trial? I think
14 that's one thing that was raised in the government's papers
15 that you haven't identified. You've said it --

16 MR. BRODSKY: Yes, Your Honor.

17 THE COURT: -- you haven't really identified and
18 explained that position.

19 MR. BRODSKY: I thank Your Honor for raising that.
20 In our reply brief, which I would like us to turn to in our
21 reply brief -- first, Your Honor, may I say that the case law
22 says that it is a legally cognizable prejudice.

23 THE COURT: I beg your pardon?

24 MR. BRODSKY: The case law, Your Honor --

25 THE COURT: Yes.

1 MR. BRODSKY: -- says that when there is mutual
2 antagonism and it's inherently, quintessentially
3 irreconcilable it's legally cognizable, so you don't go to the
4 next step. And, Your Honor, I quote Your Honor in *United*
5 *States versus Faltine*, where you made I think the wise
6 statement, I've said that, but let me -- let's assume for the
7 sake of argument that if you have quintessentially
8 irreconcilable defenses, what is the prejudice? So we tried
9 to lay out some examples of them.

10 Stepping back for one minute, can you imagine the
11 prejudice to the jury if I argue in my opening that
12 Mr. Shkreli is guilty, the government of course has already
13 opened and argued Mr. Shkreli is guilty, and then
14 Mr. Greebel -- Mr. Shkreli's counsel gets up and says my
15 client, Mr. Greebel is the deceiver and my entire opening
16 should be thrown out. What the case law says is that's two
17 defendants -- when a co-defendant faces an extra prosecutor in
18 the room, there's inherent prejudice, substantial prejudice.
19 And it's absolutely here.

20 And so, I mean we cite a number of cases including
21 Justice Stevens when he said the existence of this extra
22 prosecutor is particularly troublesome because the defense
23 counsel are not always held to the same limitations and the
24 standards. We will hold ourselves to the same standards, but
25 when we get before the jury and we are argue Mr. Shkreli's

1 guilty and Mr. Shkreli blames us and says that Mr. Greebel is
2 the problem, often what juries do -- and this is just a
3 reality of nature of the way we know how the human mind works,
4 common sense, is the government will stand there and go they
5 are both guilty. We will get up and say the other guy is
6 guilty and there are two people pointing their finger at
7 themselves saying they are each guilty. What the jury will
8 say is they're all guilty. And that possible risk is a risk
9 too great to bear. And that's what the case law says, so
10 that's one, we'll both be extra prosecutors and we cite the
11 *Zafiro* case and *the Copeland* case in support of that.

12 There will be opening statements, again, that we
13 both attack each other. On page 9 -- and I was citing on page
14 8. On page 9, juries unjustifiably infer that antagonism
15 proves guilt. We cite a number of cases standing for the
16 proposition where there is antagonism such that the two
17 defendants go -- I'm talking about going at each other on
18 everything and argue with each other on material points that
19 they're both lying and deceiving each other, that is
20 substantial prejudice and I don't think the government could
21 reasonably deny that. No jury instruction can cure that.

22 Next, when co-defendants seek to mutually destroy
23 each other, their cross-examinations and their motions change.
24 We will call witnesses that we would not ordinarily call in a
25 trial just against Mr. Greebel. Because we will have to spend

1 time focused on Mr. Shkreli and his defense.

2 Joinder may chill a defendant's right to testify. I
3 don't see how that can't be true in this case. And I think
4 that that is potentially -- we only want to do the trial once,
5 Your Honor. We do not want to go to trial with Mr. Shkreli
6 and then have the Court of Appeals find that there should have
7 been severance. What we want to do is we want to have one
8 trial and Mr. Shkreli will be able to argue, if he's found
9 guilty and he doesn't take the witness stand, that his right
10 to testify was chilled because he knew Evan Greebel had more
11 confidential, privileged information in his head that hadn't
12 been waived by MSMB or if MSMB has waived everything, hasn't
13 been waived by Retrophin. And that Evan Greebel has
14 information in his head that even if there is a privileged
15 waiver, there were communications between Mr. Greebel and
16 Mr. Shkreli that only the two of them participated in. Since
17 the government can't talk to Mr. Greebel, only Mr. Greebel
18 knows about them.

19 And so if we have a document where we know it's a
20 lie, the government doesn't know because all they have is the
21 email communication, but we have Mr. Greebel's advice and
22 knowledge and we can prove it's a lie, we will be able to
23 cross examine Mr. Shkreli about it. And we have a hard time
24 believing that Mr. Shkreli will be able to take the stand
25 knowing we have all of this information and we, as lawyers,

1 will be duty bound to do it. We will be duty bound to destroy
2 Mr. Shkreli's credibility, because if he is found credible,
3 then our client is at risk that if the jury accepts the
4 alleged conduct as criminal and they accept Mr. Shkreli's
5 credibility, then we have a problem. Because the jury will
6 potentially find -- I have a hard time saying it knowing my
7 client and knowing the evidence -- potentially find our
8 client, I would say, mistakenly guilty.

9 We raised other problems, Your Honor, on page 10.

10 THE COURT: I've read that. Okay, thank you.

11 MR. BRODSKY: I did want to answer Your Honor's
12 other -- your other point. You had a great question, Your
13 Honor, which is the government's hypotheticals and I'm glad
14 you raised it, because we in our brief try to outline the
15 fundamental problem with the government's theory.

16 First, there is no case they cite for the theory
17 that if we can come up with a hypothetical scenario,
18 speculating as to what the jury may do, then severance is
19 denied. And the reason for that is two of their theories.
20 Their first theory -- and I think we should go through each
21 one. Their first theory --

22 THE COURT: I think they are trying to address your
23 mutually antagonistic defense argument --

24 MR. BRODSKY: Yes, I agree, Your Honor.

25 THE COURT: -- and trying to show why the jury would

1 not be able to find one defendant guilty if the jury accepts
2 the other's defense. That was the point.

3 MR. BRODSKY: Yes, Your Honor. And what I'd like to
4 do is turn in our reply brief to where we laid out, I believe,
5 our view on page 15 of our reply brief, docket number 170, why
6 if Your Honor accepts the government's principle and the
7 government's approach, there will never be a severance ever
8 and that cannot be the standard.

9 The reason why is their first theory and their
10 fourth theory is that, quote, the jury may -- and I'll just
11 quote the relevant section -- also acquit Greebel because the
12 government did not meet its burden.

13 And then their fourth theory says, quote, the jury
14 may dot, dot, dot, also acquit Shkreli because the government
15 did not meet its burden. Those are the government's first and
16 fourth theories as to why severance is not permissible.

17 I ask you, Your Honor, if the government can say
18 that and get out from under severance, then there will never
19 be a severance because the government can always stand in this
20 courtroom and always offer Your Honor we may not meet our
21 burden and if we don't meet our burden, then there can't be
22 severance.

23 So their first and second arguments -- their first
24 and fourth arguments essentially ask Your Honor to do the
25 following: They ask Your Honor to conclude that if the

1 government can say that if there's a theoretical possibility
2 that you might be able to get a fair trial, theoretical, then
3 both defendants could possibly be acquitted and we should deny
4 severance, and that fundamentally violates the constitution
5 and that violates due process and that violates inherent
6 fairness. So their first and fourth theories should be
7 withdrawn, respectfully.

8 Their next theory that they have, Your Honor, that
9 we address is on page -- again, 15 -- I'm sorry, their second
10 and third theories are the ones where the burden of proving
11 the case they say they don't have the burden of proving the
12 case.

13 Their first theory is that they say the jury might
14 accept Mr. Shkreli's reliance on the advice of counsel defense
15 but find that Mr. Greebel was simply neglectful.

16 Now I ask Your Honor which party in this case is
17 going to argue Mr. Greebel was neglectful? Not the
18 government, they are arguing he acted intentionally, wrong.
19 Not Mr. Greebel because we're going to say we took actions
20 based on the information we were provided and they charged us
21 with a conspiracy, a meeting of the minds between two guilty
22 people with a corrupt intent. If we're able to show that we
23 weren't given full information, that we were deceived, we
24 weren't given material information, then there is no meeting
25 of the minds, there's no conspiracy and so we are not going to

1 argue ever that Mr. Greebel is neglectful.

2 And Mr. Shkreli, you heard his defense, he acted in
3 good faith relying on communications with Mr. Greebel. He's
4 not going to argue Mr. Greebel was neglectful. So we have a
5 theory with nobody arguing it and so that is pure speculation
6 and if the jury did that, they'd be violating their oath and
7 their jury instructions which is not to take some theory, not
8 to take some evidence that's not in the record and draw a
9 conclusion. So that theory should be withdrawn.

10 Their fourth theory is that the jury might accept
11 our defense that Shkreli lied and deceived him. But they
12 might acquit Shkreli, quote, because Shkreli was simply
13 passing along misinformation from another source and did not
14 have the intent to commit a crime.

15 I'd like to know who's going to say that when it
16 came to MSMB's assets under management Mr. Shkreli, who was
17 the head of MSMB, who was doing all the trading, who was
18 responsible for the assets, received information about the
19 assets from somebody else. I'd like to know who they think
20 Mr. Shkreli is going to point a finger to when they ask him
21 about he's the founder and CEO of Retrophin. It has about
22 five, seven, eight employees, they basically all report to
23 him. We're talking about a company that was founded and
24 originated in the mind of Mr. Shkreli. And, yes, it's now
25 nearly a billion dollar company, but at the time in 2012 it

1 was a nothing. The shares were worth nothing. And so the
2 idea that in 2012, 2013, Mr. Shkreli is going to take a
3 defense that he's going to say, I didn't know what assets were
4 under MSMB is simply speculation and untrue.

5 And, Your Honor, we laid out in our brief in detail
6 in our motion -- and I understand why Mr. Brafman might have
7 been upset about it, if I were representing his client I would
8 be as well -- but we laid out in our brief evidence that's not
9 in the indictment, evidence that's completely admissible at
10 trial and it's evidence that are email communications where
11 they are proactive, affirmative lies. The same lies the
12 government alleges were made -- that Mr. Shkreli made against
13 investors. And we laid out it in our motion papers on
14 page 11, our first example, 11 and 12. And the government has
15 not disputed it's a lie. They're not coming forward and
16 saying, oh, that wasn't a lie to Mr. Greebel. They're not --
17 they are ignoring it. They are essentially saying, oh, there
18 might be evidentiary obstacles to Mr. Greebel's defense.
19 There are no evidentiary obstacles to that. And we're going
20 to be able to prove, through all of those admissible email
21 communications, that Mr. Greebel directly asked in connection
22 with his representation of MSMB for activism work not for fund
23 formation, not for investor relations, not for communications
24 with others, but Mr. Greebel, on behalf of Katten and other
25 lawyers representing MSMB entities, was representing MSMB in

1 connection with activism work and the government has
2 acknowledged and conceded that. They say in connection with
3 MSMB Capital and MSMB Healthcare, Mr. Greebel was not doing
4 fund formation work or doing investor relations, wasn't
5 participating in any alleged misrepresentations. But we lay
6 out the emails in October of 2011 in connection with a
7 disclosure to the SEC regarding a proxy solicitation regarding
8 activism, that MSMB was taking an activist position with a
9 publicly traded entity. They had to fill out a proxy
10 solicitation form and Mr. Greebel was directly asking him,
11 what is your assets under management. What is your AUM? And
12 undeniably, indisputably, and the government cannot dispute it
13 because they allege the same lie, Mr. Shkreli responded 40M
14 meaning \$40 million. Mr. Greebel had no idea it was a lie,
15 absolutely no idea according to the government and we agree.
16 He just started representing MSMB in the summer of 2011. So
17 just a few months into the representation Mr. Shkreli lies to
18 him directly with a 40 million-dollar number. The
19 government's evidence shows, and we will -- if the government
20 doesn't admit it we will, that he didn't have \$40 million of
21 assets under management then. And this is how the
22 relationship starts, a material lie about the assets under
23 management at MSMB in October of 2011.

24 And I tell, Your Honor, I tell you in good faith,
25 full proffer, it's not the first lie. We know based on all

1 the discovery we received from the government, and based on
2 what Mr. Greebel was personally told by Mr. Shkreli, there are
3 many other lies. And you can't look at the email and identify
4 the lie, but we can identify the lie because it is
5 inconsistent with what Mr. Greebel was told.

6 And Mr. Greebel follows up with questions about, I'm
7 going to make this statement to the SEC, is this accurate?
8 And Mr. Shkreli changes the statement to put approximately in
9 front of \$40 million in assets under management. Another lie.

10 Those documents are admissible and when we call
11 Mr. Greebel to the stand and, Your Honor, we have every intent
12 to do it, we put in -- and I heard Your Honor's statement
13 regarding an affidavit and I take your point, Your Honor, when
14 we looked at the case law, when we looked at the *United States*
15 versus *Paul* case, we looked at the *United States* versus *Scully*
16 case, we never saw a single incident, except for one case the
17 government cites, where the defendant voluntarily, on his own,
18 decided to take the witness stand in an evidentiary proceeding
19 before trial. We haven't seen a single incident where anybody
20 has required a defendant to get on the witness stand and offer
21 up what their defense is and the reason for that is because it
22 is unconstitutional, I'll just say it. I violates the Fifth
23 Amendment to force the defendant to take the witness stand if
24 they don't want to voluntarily do it.

25 And there's good reason for that. And in

1 suppression hearings in this courthouse, in federal
2 courthouses across the country when there are suppression
3 hearings, the government never can call the defendant to
4 testify. The defendant often takes the stand, no question,
5 and their statements can't be used against them. I'm not so
6 sure it's true in a Rule 104 evidentiary hearing, but even
7 assuming it's true, the government sits there and listens to
8 Mr. Shkreli make statements and learns from that. But that's
9 not my argument and we put in a submission, Your Honor, which
10 I can address why we did it.

11 The second -- why is it important that we can prove
12 a lie on MSMB? And I think it's important, Your Honor, that
13 the government may stand up and say, well, that relates to
14 Counts One through Six, that has nothing to do with the next
15 count. Why doesn't it have anything to do with Count Seven?
16 Notably, Your Honor, the government seems to take
17 contradictory positions. On the one hand in many of their
18 papers they say that Mr. Greebel had nothing to do with Counts
19 One through Six, absolutely nothing. He wasn't involved in
20 the hedge fund scheme charged in Counts One through Six in
21 terms of assets under management, but then they morph over on
22 the other hand and say, wait a second, he orchestrated it
23 because it's in paragraph 7. He orchestrated Counts One
24 through Six they didn't charge him. And how did he do that?
25 Well, he was involved, they say -- this is what they allege,

1 that he was involved in backdating stock transfer agreements
2 in or about November of 2012.

3 Your Honor, imagine Mr. Greebel -- put aside the
4 fact that the government didn't have this evidence because the
5 evidence about the lie of \$40 million came out after
6 indictment, after the waiver of privilege, so the government
7 didn't have this information. Imagine Mr. Greebel, he's under
8 the impression that MSMB Capital has \$40 million under
9 management. We're heading into the fall of 2012. Mr. Shkreli
10 is asking him to do some stock transfer agreements between
11 private parties relating to MSMB Capital having stock in
12 Retrophin. If Mr. Greebel, in good faith believes, and we've
13 proven it, that MSMB Capital has \$40 million, that changes the
14 entire perception of the government's theory.

15 Now the government's theory is that Mr. Shkreli in
16 October -- on or about October 4th, 2012 gets a subpoena from
17 the SEC and on his own, without counsel, without Katten as
18 counsel without, as far as we know, any counsel, does
19 something that nobody does. Does something that nobody does
20 when he voluntarily came to the Eastern District of New York
21 to talk to Mr. Paes and his colleagues. I haven't heard
22 anybody do that ever. It never happened when I was in the
23 Southern District of New York, but Mr. Shkreli did that. He
24 received the subpoena in October 2012 and he voluntarily, on
25 his own, without telling anybody, responds.

1 And the government says he lied. They said he lied
2 about the assets under management and, you know what, we
3 agree. We didn't know about it, we never knew about that lie
4 but we learned about it later and we agree now that it is a
5 lie. Why did we learn about it later? We got the discovery
6 that he was lying about MSMB Capital and all the assets under
7 management, but the government's theory is that he lies to the
8 SEC, Mr. Shkreli, about the assets under management and after
9 lying he now needs to create some assets at MSMB Capital. So
10 what does he do? He arranges some stock transfers, they say,
11 made up, totally backdated in order to get assets to MSMB
12 Capital.

13 Now, assuming that theory is true, that's charged in
14 connection with the Retrophin scheme. It's not charged in
15 connection with Counts One through Six. The government can
16 try to go back and try to amend the indictment, but that's not
17 what the indictment says. It's charged in Count Seven.

18 If, Your Honor, you take the standpoint of
19 Mr. Greebel, who doesn't know about the SEC subpoena, who has
20 no idea that Mr. Shkreli has lied to the SEC about the assets
21 under management at MSMB Capital and he actually believes
22 Mr. Greebel, based on lies told by Mr. Shkreli that MSMB
23 Capital has \$40 million under management, then doesn't that
24 paint a completely different portrait of the conduct and
25 doesn't that exonerate our client from guilt and that is what

1 we are going to argue at trial. And to do that we need to
2 argue and establish that Mr. Shkreli lied about the assets
3 under management at MSMB and we're going to prove that and
4 we're going to do that.

5 We need to prove that Mr. Shkreli never told anybody
6 about that SEC subpoena. We're going to do that. We need to
7 prove that Mr. Shkreli on his own made up those lies. We're
8 going to do that. We need to prove that in the fall of 2012
9 it's not the only lie that Mr. Shkreli told Mr. Greebel and
10 we're going to do that too. So that's the significance of
11 that lie.

12 We also, Your Honor, laid out evidence and, again,
13 this is in our motion brief on pages 13, 14 and 15, through
14 email communications the lie about a board member's loan.
15 Mr. Richardson was on the board at the time and Mr. Shkreli
16 communicated to him and said to Mr. Richardson, without
17 Mr. Greebel being on the communication, we need money and they
18 agreed that it was going to be a loan. In separate
19 communications, Mr. Greebel, in connection with SEC filings
20 for Retrophin, was asking, as a good attorney would do, what
21 are your loans? We need to report these loans, if you have
22 loans to Retrophin. And what Mr. Shkreli did was lie. He
23 turned Mr. Richardson's loan into an equity investment.

24 Now why do we care? What does that have to do with
25 the case? The government is saying that Mr. Greebel is

1 responsible for the capitalization table. The government is
2 saying that Mr. Greebel knows everything that is going on the
3 in the cap table. He knows when there are a lies with respect
4 to the cap table, he controlled it, that's the government
5 theory. If we're able to show, which this is one example of
6 many, that Mr. Greebel was lied to in connection with what's
7 an equity investment versus a loan, then it destroys the cap
8 table. The cap table should not have reflected
9 Mr. Richardson's loan. Mr. Shkreli lied to Mr. Greebel and
10 called it an equity investment; a total lie. We're going to
11 prove that in court.

12 Then, Your Honor, in connection with that, the
13 government also alleges that Mr. Greebel and Mr. Shkreli were
14 not reporting what's true to the board. Well, Mr. Greebel, in
15 email communications to Mr. Shkreli in connection with
16 Mr. Richardson, said you must report all loans to the board.
17 You have to, it's SEC's -- you have to disclose it. And that
18 is another lie that we will say -- we will say that he turns
19 it into an equity investment unbeknownst to our client.

20 We then make out the following lie, Your Honor, it's
21 the third example -- and, again, the government hasn't
22 disputed any of this in their papers, page 15 and 16, all
23 these documents are admissible. They're business records and
24 they're also records, Your Honor, that go to state of mind and
25 they are also statements that we're going to offer not for the

1 truth. They are lies. We don't need to offer them for the
2 truth, in fact, we're going to argue they're lies. But with
3 respect to our third example, specific example we have
4 Mr. Shkreli lying to Mr. Greebel and Katten Muchin about
5 repaying a loan of \$770,000 he says so that -- Mr. Shkreli
6 tells a partner at Katten and Mr. Greebel that he's going to
7 imminently repay the money and that they should tell that to
8 the SEC. This other very prominent, former federal prosecutor
9 based on the information provided by Mr. Shkreli tells the SEC
10 what Mr. Shkreli told them. And we've learned from the
11 discovery, from the Bank of America records that over a year
12 later those records show exactly when the transfer was made
13 and the transfer was not made when Mr. Shkreli told the Katten
14 Muchin partner, other than Mr. Greebel, and that Katten Muchin
15 partner conveyed it to the SEC.

16 Why is that relevant? The government says they are
17 going to introduce evidence or they implied that Mr. Shkreli
18 obstructed the SEC investigation. If they don't introduce it,
19 we are. If they don't introduce evidence that Mr. Shkreli
20 lied to the SEC, we're going to do it. If they don't
21 introduce evidence that he obstructed, through this lie to
22 this Katten partner, we're going to do. And even if they do
23 it we're going to stand up and completely agree. We're going
24 to be an echo chamber with the government in terms of
25 Mr. Shkreli's lies.

1 We also submitted, Your Honor, a sworn declaration
2 laying out on Count Seven and Eight, that's where we are
3 charged, that we are -- I proffered to you in good faith not
4 only are those lies material to Seven and Eight, because as
5 the government says they are interrelated alleged schemes, if
6 we can prove lies about MSMB, we can prove the whole lies
7 flowing through.

8 I don't want to lay out all the evidence on Seven
9 and Eight, but we are going to prove that on the very material
10 points he didn't tell Mr. Greebel material information, on
11 very material points he lied to him and he deceived him.
12 That's going to be very important.

13 If the government's theory, again, is that
14 Mr. Greebel's legal advice or his communications were part of
15 a criminal conspiracy, we're going to show that there was no
16 meeting of the minds because Mr. Greebel was lied to.

17 I'm trying to see whether Your Honor has additional
18 questions that you wanted to address. I think I addressed the
19 government's scenarios. I did want to go back over a little
20 bit of some of Mr. Brafman's unfortunate statements regarding
21 our client.

22 THE COURT: I think he was making the opposite
23 argument that your client made unfortunate statements about
24 his client.

25 MR. BRODSKY: Right. And I want to clear up from

1 our perspective what -- because that's important to us.
2 Mr. Greebel did not make a single misstatement after his
3 arrest. There's no lie there. And I know Mr. Brafman is
4 going to stand up before the jury and argue it was, well it's
5 an outrageous -- it's absolutely outrageous.

6 Mr. Greebel didn't know ever he was a subject of a
7 criminal investigation. So he's woken out of his bed,
8 standard operating procedure for the FBI, I'm not criticizing
9 them, multiple FBI agents driving into a house, you know, this
10 is what the FBI does. I worked for the government, I
11 understand they must care for their safety. They grab the
12 person that they're going to grab and arrest, standard
13 operating procedure. They bring him over to get
14 fingerprinted. Mr. Greebel repeatedly asks in this condition,
15 in front of his family he's arrested, fine, that's procedure.
16 He didn't know at all he's under investigation for this. He
17 goes down to get arrested and they put him in a room, of
18 course, they have handcuffs on him and they ask him a series
19 of questions. And one he asks for the indictment and the
20 charges and they don't give it to him. He asks for a lawyer
21 several times and they don't -- they ignore him. Now he's a
22 lawyer and he doesn't -- he didn't do anything wrong so he's
23 answering the questions. We're not moving to suppress the
24 statements, Your Honor. You didn't get a motion from us to
25 suppress the statements. Even though they asked him,

1 repeatedly, he asked for lawyer and they ignored him and kept
2 going, we're not moving to suppress the statements. We
3 believe those statements were accurate.

4 He was asked a series of questions, he answered
5 them, but in the context of not even knowing why he was
6 arrested, they wouldn't tell him, they asked him about his
7 role. At one point the FBI agent in the quote in the
8 government's brief, the FBI agent asks him if he's the general
9 counsel to Retrophin. And if you look at that -- I just found
10 it absolutely remarkable. This is the quote from the
11 government's brief. On page 15 of the government's brief the
12 FBI agent said, all right, so now you're the general counsel
13 for Retrophin. And Mr. Greebel says no. And the FBI agent
14 says what's it called, sorry? And Mr. Greebel says, I'm a
15 lawyer for the company, I don't work for the company. And the
16 FBI agent says I was thinking outside general counsel. And
17 Mr. Greebel goes nope. Okay, so you're a lawyer that works
18 for your own company but you're consulting for Retrophin? And
19 he says no, no, no. This is an FBI agent who is either trying
20 to pretend he doesn't have any knowledge or misunderstanding
21 that Mr. Greebel is outside counsel for Retrophin and works
22 for Katten. And that's all Mr. Greebel was doing in trying to
23 explain that.

24 When Mr. Greebel was asked about board meetings he
25 says, I participate by phone, I've been there twice. All

1 true. He doesn't know who else is in the room, if they
2 participate and he's by phone. And so I don't -- I understand
3 Mr. Brafman is going to accuse him of false exculpatories in
4 connection with his post arrest statements, we're prepared to
5 defend each and every answer and we welcome the government
6 putting that into evidence because we believe it's true and we
7 think it will show very well what happened here.

8 THE COURT: Does he take the position that the board
9 at Retrophin approved the consulting agreements and the loan
10 agreements?

11 MR. BRODSKY: Well, Your Honor, there's the
12 settlement agreements.

13 THE COURT: The settlement agreements, excuse me.

14 MR. BRODSKY: Right. There's the settlement
15 agreements for a period of time and then there are consulting
16 agreements.

17 THE COURT: Yes.

18 MR. BRODSKY: I'm not telling you anything the
19 government doesn't know, I'm in a challenging position here,
20 Your Honor.

21 THE COURT: Okay.

22 MR. BRODSKY: A unique challenge. Let me put it
23 this way --

24 THE COURT: He was secretary, wasn't he? Didn't he
25 attend all the board meetings?

1 MR. BRODSKY: He was not an officer or director of
2 the company. When a company is small -- and we get this from
3 our experts, when a company is a private company and they're
4 extraordinarily small and they have five, 10 employees and
5 they have outside counsel. The outside counsel will serve --
6 they don't have a general counsel, they don't have an in-house
7 counsel, that's usually who goes to a board meeting, takes
8 notes and says what's happened at the meeting. Mr. Greebel
9 was outside counsel, but he served as the note taker. Those
10 notes have been produced, those notes exist. The government
11 has different views of those notes. We have a problem with
12 their view of the notes. We intend to prove their view is
13 wrong.

14 The arbitrator before the Rosenfeld arbitration, the
15 government produced the transcript from that arbitration.
16 Retrophin, in that case just to be clear, the government has
17 said Mr. Rosenfeld had a sham agreement with Retrophin.
18 Mr. Rosenfeld -- Retrophin said it was a sham agreement as
19 well. So this happened in October 2014 after Mr. Shkreli is
20 removed as CEO of Retrophin. Mr. Rosenfeld demanded the rest
21 of his payment pursuant to the contract and said this is a
22 real agreement, I want my money. I provided advice, I
23 provided counsel, this is a real agreement.

24 The government again calls it a sham. They
25 interviewed -- the disclosures that were made during --

1 pursuant to Brady disclosures they interviewed Mr. Rosenfeld
2 and they didn't believe him. Mr. Rosenfeld carried it through
3 to arbitration. Retrophin represented themselves. They had
4 Cooley representing them. And they argued the board notes
5 were a sham and that this agreement was a sham. This
6 arbitrator heard evidence from the testimony of Retrophin's
7 CEO, heard the testimony of multiple witnesses including
8 Mr. Rosenfeld and after a multi-day hearing with many
9 submissions of documents in evidence, completely rejected
10 Retrophin's theory that it was false and a sham and completely
11 accepted the theory of Mr. Rosenfeld that it was real.

12 Now, Your Honor asked the question, are we going to
13 argue that the board knew? I will tell you this, Your Honor,
14 what the evidence shows from the transcript of Mr. Rosenfeld's
15 arbitration is Mr. Rosenfeld's lawyer argued that the SEC
16 filings at a certain point, I think it was 2013 or maybe it
17 was 2014 -- I don't know sitting here, but I believe it's
18 2013, SEC filings signed by the now CEO of Retrophin,
19 Mr. Aselage, reflected those settlement of payments and I
20 think Mr. Rosenfeld's lawyer argued that those -- although
21 Retrophin argued that the settlement agreements were unknown
22 to the board, what persuaded the arbitrator, one of things
23 that persuaded the arbitrator, including credibility judgments
24 that every judge makes or arbitrator makes, is the fact that
25 the SEC filings reflected the settlement agreements and the

1 fact that Mr. Aselage's testimony that he didn't remember ever
2 discussing these settlement agreements seemed inconsistent
3 with the fact that he signed SEC filings, which reflected the
4 settlement agreements.

5 So to answer your question, will there be evidence
6 that the settlement agreements were known to the board? I'd
7 tell you, Your Honor, it can be undisputed given that they
8 were disclosed in SEC filings, that they were known to the
9 board at a certain point.

10 But in terms of Seven and Eight, we do have evidence
11 with respect to Seven and Eight.

12 THE COURT: These were settling liabilities that
13 were not Retrophin's, right? They were settling debts that
14 arose because of MSMB or Elea or the other failed funds.

15 MR. BRODSKY: Well, let me give you another example
16 Mr. Rosenfeld argued.

17 THE COURT: I don't know whether it's a matter of
18 whether they disclosed it but rather whether they were
19 settlement agreements of matters for which Retrophin should
20 have been paying.

21 MR. BRODSKY: Correct. No, that is definitely the
22 nub of a critical issue. We will have evidence on that issue,
23 we believe the evidence completely exonerates us. We do
24 believe the evidence in connection with those settlement
25 agreements and consulting agreements, without laying out our

1 defense, as much as I want to lay out our defense and I'd like
2 to do --

3 THE COURT: No, I'm not asking you to do that. I'm
4 just curious about some of the things that you've said. I
5 understand that the arbitrator found with regard to
6 Rosenfeld --

7 MR. BRODSKY: Yes.

8 THE COURT: -- that that was a legitimate consulting
9 agreement.

10 MR. BRODSKY: Correct.

11 THE COURT: Are you taking that position with the
12 other consulting agreements?

13 MR. BRODSKY: Without compromising our defenses, I'm
14 saying what Mr. Rosenfeld -- what was found in the Rosenfeld
15 arbitration. I'm not saying necessarily that we are going to
16 take a certain position on it. I don't want the government to
17 know and I also don't want Mr. Shkreli to know in case there's
18 a joint trial.

19 I do believe that our defenses on Seven and Eight
20 are impregnable. In other words, there is undeniable
21 reasonable doubt. We are going to affirmatively prove our
22 client's innocence and I believe -- I mean, look, Your Honor,
23 this was a mistake. The government makes mistakes, they are
24 not -- you know, they are not immune from doing so. They're
25 human beings like anybody else, it's not intentional but we

1 are going to affirmatively prove our client is innocent and I
2 don't want to lay out, for either the government or
3 Mr. Shkreli, evidence that will enable them to think, oh, this
4 is what they're going to argue on that so I get to repel it.
5 Happy to submit it ex parte and in camera for Your Honor.

6 THE COURT: No, that's all right.

7 MR. BRODSKY: I do think you're right, to address
8 your point on the settlement agreements, and I don't think I'm
9 telling the government anything they don't know. There are
10 settlement agreements and consulting agreements and, let's put
11 it this way, Your Honor, not every consulting agreement the
12 government thinks Mr. Greebel was the author of every one.
13 Let me give a little tidbit of our defense. That's not true.
14 That is a hundred percent false and we're going to prove it.
15 The government doesn't know this and the government doesn't
16 know how we're going to prove it and when the government
17 opens, and I believe they will open and I believe they will
18 say all these consulting agreements were arranged by
19 Mr. Greebel, we're going to affirmatively prove that's not
20 true. They don't know that, they don't know how and I don't
21 want to lay out how, but we're going to be able to do it I
22 tell you in good faith because of the lies Mr. Shkreli told.

23 We're going to be able to prove, Your Honor,
24 Mr. Shkreli told third parties that Mr. Greebel gave certain
25 advice. He said Mr. Greebel did this, Mr. Greebel says that

1 when it was untrue. Untrue. And so I know the government,
2 when they see an email and it says Mr. Greebel says this, they
3 shouldn't take it as necessarily true unless they have a
4 credible third-party witness, unrelated to Mr. Shkreli, who is
5 going to say it.

6 We're also going to prove that Mr. Shkreli was
7 provided advice by Mr. Greebel and then told the opposite to
8 others, and that's part of our defense. And we have to do it,
9 Your Honor. I understand -- I'm not defending Mr. Shkreli.
10 We're in the position we didn't choose to be in this position
11 and so in our principle, a core of our defense is to attack
12 his credibility and to go after him for lies and deception and
13 material omissions. We have absolutely no choice to do it in
14 order to affirmatively prove our client's innocence.

15 THE COURT: All right. Thank you.

16 Mr. Brafman, are you ready to be heard or
17 Mr. Agnifilo?

18 MR. AGNIFILO: One brief point, Your Honor.

19 THE COURT: Yes, you're welcome to argue.

20 MR. AGNIFILO: That's okay as long as Your Honor can
21 hear me okay.

22 THE COURT: I can hear you.

23 MR. AGNIFILO: Okay. Your Honor a few minutes ago
24 used a phrase "specific trial right" and so I just wanted to
25 talk about that in two contexts and I think you made reference

1 to one of the government's briefs.

2 Let me tackle the term head on. In this case after
3 listening to what Mr. Brodsky just said and I think coming to
4 terms with the fact that Mr. Brodsky and his client don't have
5 any discovery obligation to us certainly in terms of the four
6 years of conversations that our client had with their client,
7 the specific trial right that comes to mind first is the
8 specific trial right of testifying in one's own defense. The
9 rules normally, obviously, is before people get to say bad
10 things about you when you're a criminal defendant in open
11 court, there are pretrial procedures for such a thing. Also,
12 in the normal case you don't have the person saying bad things
13 about you as someone who was functionally your lawyer for four
14 years, who you spoke to every day, on the weekends, at night.

15 I mean, one of the things that's referenced in the
16 emails is not only the communication by email but the ongoing
17 relationship that Martin Shkreli had with Evan Greebel. And
18 so there is a -- unprecedented is a very strong word, but a
19 highly unusual situation that we're in, because we're being
20 told flat out in no uncertain terms that Mr. Shkreli's lawyer
21 has information that only Mr. Shkreli's lawyer knows and that
22 if Mr. Shkreli testifies in his own defense, Mr. Shkreli's
23 lawyer is going to use that information to cross examine him.

24 THE COURT: You meant to say Mr. Brodsky.

25 MR. AGNIFILO: Mr. Shkreli's lawyer at the time, I'm

1 talking at the time.

2 THE COURT: At the time.

3 MR. AGNIFILO: Yes, I'm talking about Mr. Greebel.
4 I'll use proper names.

5 THE COURT: I was thinking Mr. Brafman would not be
6 cross examining and you would not be cross examining
7 Mr. Shkreli, you're talking about his former --

8 MR. AGNIFILO: Yes. Mr. Greebel with whom he spoke
9 for four years about a variety of subjects.

10 And I think Your Honor made a very good point,
11 what's the relevance of \$10 million. It's a big number, but I
12 think what it shows is it's a lot of work, it's a lot of
13 communication, it's on a variety of subjects and if we have to
14 come to terms with the fact that it would be relevant,
15 anything would be relevant if it tended to show some measure
16 of deception, some measure of dishonesty. I think to
17 Mr. Brafman's point earlier, A, we're going to get in a very
18 confusing situation with, well, does Mr. Brodsky really get to
19 cross examine Mr. Shkreli on that point, is that too
20 tangential. And then -- this is really the specific trial
21 right that I think we're most concerned about, is we have to
22 take strong notice of the fact that if Mr. Shkreli decides to
23 defend himself and get up on that witness stand, we have no
24 way of knowing what's coming. Not from our colleagues at the
25 government because there are rules regarding that, but from

1 our co-defendant. And I think that's really the heart of the
2 problem.

3 And I think there are other specific trial rights
4 but if I had to identify one where I think the problem has
5 ripened to the point, you know, beyond speculation to a point
6 where it's tangible and real and really the product of how
7 defense lawyers make decisions and how a client makes a
8 decision on whether to get up on the witness and testify in
9 his own defense, we're there now. I think we're clearly there
10 now after listening to Mr. Brodsky's presentation.

11 In the normal case I haven't cited to the rule but
12 obviously 404(b) we'd have hearings on this, we'd know what's
13 coming. We just don't know what's coming and we have no way
14 under the discovery rules to know what's coming. And so I
15 think it's going to have a clear chilling effect I think on
16 his right to get up and testify. So that's the first thing I
17 wanted to say.

18 The other thing, and this is, I think, a little more
19 an esoteric point but I think it's worth making. The
20 government, in their principal brief on severance on page 22
21 lays out a three-step process that they encourage Your Honor
22 to file, and I'll let Your Honor get there.

23 THE COURT: Yes, I'm there.

24 MR. AGNIFILO: I don't think the three-step process
25 is legally sound. I think the first step of the three-step

1 process is the totality of the law in this area and I say that
2 because the cases such as *Serpoosh* S-E-R-P-O-O-S-H and *United*
3 *States* versus *Tutino*, T-U-T-I-N-O, are Second Circuit cases
4 that really only talk about not just antagonism, because that
5 under *Zafiro* is not enough, but antagonism to the extent of
6 accepting one defense precludes the other. So I think that in
7 a sense is a second independent trial right, so if we're
8 looking at the different trial rights that are at issue and I
9 think what the government has done and I think what they're
10 doing is they're trying to flesh these things out but they're
11 suggesting that they're elements almost of the overall
12 analysis, which I don't think is true, is to basically say
13 that there are two additional steps. But I think at the end
14 of the day we see this certainly in *the Aronson* case, the
15 specific trial right that is the right at issue is to have a
16 jury decide your own fate without a mutually antagonistic
17 co-defendant in the courtroom. Because if you look at *the*
18 *Aronson* decision, and it's a fairly thorough review of the
19 law, they don't talk about specific trial rights, they don't
20 talk about things like that, they talk about what's here in
21 the government's first of three points here and I think that's
22 the totality of the law.

23 But if Your Honor were looking for things called
24 specific trial rights, I think there are at least two, right
25 to testify in one's own defense and the right to have a jury

1 evaluate yourself without an antagonistic defendant sitting
2 alongside you. Thank you, Your Honor.

3 THE COURT: Did you want to be heard further on your
4 motion?

5 MR. BRAFMAN: No, Your Honor.

6 THE COURT: Thank you. The government.

7 MS. SMITH: Your Honor, I just want to briefly
8 address, there were three other arguments other than
9 antagonistic defenses that were raised by the defendants.
10 Mr. Brafman referenced one, the other two of the spillover
11 evidence and this idea that Shkreli will cause so much chaos
12 in the courtroom that it will deny Mr. Greebel a fair trial.
13 And I just want to touch on those.

14 I do believe that the antagonistic defenses is
15 really the meat of the severance motion and, frankly, where
16 the severance motion will be decided, but just to touch on
17 these others. And before I address those arguments I just
18 want to note that Mr. Greebel, in his reply brief, attached
19 the declaration of the law professor, which we have two
20 objections to.

21 First, I don't know why it wasn't attached to the
22 moving brief because it's not really a reply, it's just a
23 further argument of the initial statements and if it was meant
24 to do that, then we should have had the opportunity to respond
25 to it.

1 But second and, more importantly, conclusions of law
2 are not an appropriate subject for expert testimony. There is
3 plenty of black letter law on that. I have *United States*
4 *versus Scott*, which is 946 F2d 135, which is a Second Circuit
5 case and then just, generally, McCormick on Evidence, Fifth
6 Edition, Section 12, which says that the Federal Rules of
7 Evidence do not permit opinion testimony on matters of law.

8 The declaration doesn't add anything to the brief
9 that's not already argued by counsel and what it seeks to do
10 is impermissibly step into the role of the Court and assume
11 the black robe, basically substituting the professor's
12 judgment for the judgment of the Court by doing the same thing
13 that Your Honor would do by looking at the facts and the
14 relevant law and reaching a decision about whether or not
15 there is sufficient prejudice to warrant a severance. So I'm
16 just going to raise this now because Mr. Greebel also attaches
17 a similar declaration to the motion response in connection
18 with the hearing and I just kind of want to flag that now
19 because as a general matter it's our position that those are
20 inappropriate.

21 Then just briefly with respect to the chaos
22 argument, which Mr. Brafman touched on, it's our position that
23 many of the materials that were attached are not admissible,
24 as Your Honor noted. There were kind of two buckets of
25 admissible statements which is what we discussed in our brief.

1 There were some public statements that Mr. Shkreli made that
2 directly relate to the case itself, and there may be some
3 public statements that go to credibility in terms of
4 truthfulness, but the vast majority are not admissible. So
5 statements about that whether Mr. Shkreli insulted a
6 particular individual or group or expressed what might be
7 considered an unpopular opinion, he's not being tried in this
8 case for his public persona, he's being tried for the crimes
9 that he committed with respect to MSMB and Retrophin. And
10 there is a good reason that cases are tried in criminal court
11 and not newspapers because the Federal Rules of Evidence apply
12 here and the vast majority of what was attached would not ever
13 come in at Court. And we obviously have full confidence in
14 the Court's ability to kind of be a gatekeeper of those
15 materials.

16 And further, in kind of support of that argument
17 Greebel cited to one New York County case kind of -- for the
18 idea that if your co-defendant is so notorious you can't be
19 possibly tried with them, but in the Second Circuit there are
20 cases like Alloyd, and Gotti. You know, John Gotti was
21 considered too notorious to have his co-defendants be tried
22 with him. So the case law really shows this as argument I
23 think is not persuasive.

24 The same with the spillover prejudice argument. I
25 know Your Honor has already mentioned it, but the two schemes

1 are inextricably intertwined. Most of the evidence I'm
2 hearing the defendants talk about would be admissible at a
3 trial, a joint trial as well as at separate trials and so I
4 don't think the spillover evidence argument is persuasive.

5 And I just want to touch on the *Bruton* argument
6 really quickly because I think it's a red herring. As we said
7 in our brief and in the statement of facts that we set
8 forward, most of Mr. Shkreli's statements barely mention
9 Mr. Greebel. It would be very simple to leave out those
10 sections or sanitize them. Mr. Greebel's post arrest
11 statement obviously does mention Mr. Shkreli in many respects,
12 however, there are portions of it where he's discussing, we've
13 already talked about his role on the board, what his role was
14 with respect to Retrophin, and I think that those statements
15 could be separated out and sanitized. Should the case
16 actually proceed to a joint trial, we could litigate those
17 issues, we'll obviously abide by the Court's determination and
18 if for some reason there is a statement that the government
19 would want to introduce on its case in chief and we cannot
20 Brutonize it, then we will not introduce it. So I just don't
21 think that the *Bruton* issue is going to actually exist in this
22 case.

23 So the heart of the defendants' motion is really the
24 antagonistic defenses argument. And I understand what defense
25 counsel are saying about the kind of three steps, but the

1 truth is the cases are a little bit of a morass. Some cases
2 basically define antagonistic defenses, some talk about
3 mutually antagonistic defenses, sometimes the cases say the
4 core of the defenses are antagonistic that's enough, and then
5 there's also this language of you have to be able to say they
6 are so antagonistic that to convict one you'd have to acquit
7 another, which is the reasons set forth in kind of all the
8 examples where we don't think that's actually the case.

9 I think the cases that are most important are really
10 kind of two sets of cases. One is where Courts have
11 specifically looked at the situation at hand. Where you have
12 one defendant who is a client, the other defendant is an
13 attorney. The client is asserting advice of counsel and the
14 attorney is basically saying I didn't get full information.
15 And there are cases, numbers of cases where a joint trial has
16 gone forward with those --

17 THE COURT: Well, Mr. Brodsky claims he did an
18 exhaustive search with his firm's vast resources and only came
19 up with three cases.

20 MR. BRODSKY: Yes, Your Honor, W.R. Grace, the
21 Belnick case, which the government has voluntarily severed,
22 and then *the Aronson* case. And just to note, Your Honor, we
23 cited in our moving papers all the cases that I think the
24 government is about to cite and we put it in our moving papers
25 because we know Your Honor likes to see the vast range of

1 cases that are out there.

2 We explained why each one in those cases the
3 attorneys were not alleging that the client was a liar and
4 deceiver, they are very different. What they said in those
5 cases was they were finger pointing or the attorney was saying
6 I'm acting in good faith because I get the information and I
7 use it, I didn't commit the crime. Those cases, like the
8 *Scott* case for example, the Second Circuit, was not a case
9 where the attorney was saying his client was a liar. It's
10 very different, but I'll allow the government obviously to
11 proceed.

12 THE COURT: All right, thank you.

13 MS. SMITH: So that is actually the exact
14 distinction I was going to make, which is that there are cases
15 where an attorney and a client who are asserting -- attorneys
16 asserting that they didn't have full information, clients
17 asserting advice of counsel have gone to trial in a joint
18 trial, and that's the *Scott* case, the *Abacoro* case and that's
19 generally considered that they are not mutually antagonistic.

20 And the question is what makes this case different
21 than those. I think the only answer to come up with is
22 exactly what Mr. Brodsky has said, is that the defendants in
23 this case have ramped up kind of the animosity to such an
24 extent in order to achieve a severance. And it is not clear,
25 as we said in our brief -- or we are skeptical that at

1 separate trials, particularly with respect to Mr. Greebel who
2 has gotten up here and said a fraud occurred, Mr. Shkreli
3 committed crimes, on and on and on, you know, in order to kind
4 of ramp up the finger pointing. And I agree that the case
5 law -- and I think we conceded this in our brief, there is
6 case law that expresses concern about the third prosecutor
7 idea and about the idea that, you know, if one defendant is
8 saying the other defendant is actually guilty that that
9 creates a concern with respect to severance and that is what
10 the case law says.

11 Our feeling here is kind of two fold. One is that
12 this is a particularly complex case and a lot of the cases
13 where the defendants are pointing at each other, cases like
14 *Serpoosh* and *Tootick* are cases where the crime is very clear,
15 it's a stabbing or it's a drug deal and there are two people
16 present at the crime and clearly one of them did it and they
17 are pointing at each other. And one of the arguments we've
18 made was that this is an incredibly complex case with many,
19 many different issues and it is not clear at all that by
20 pointing at each other the Court -- or the jury would have to
21 conclude that one defendant was guilty and the other one was
22 not based on kind of the circumstances.

23 (Continued on the next page.)
24
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1 MS. SMITH: (Cont'g.) And so it is a very
2 different set of facts than any basic criminal cases where,
3 first of all, the crime is very clear. I mean, here we have
4 a fraud that we need to show, and there are a lot of
5 elements to it. And so I expect, and this is one of the
6 things that we're skeptical about, that defendants are going
7 to say in the first instance, we're not even sure there was
8 a crime because, for example, Retrophin had a responsibility
9 to pay back the MSMB investor for one reason or another.

10 So it is very surprising to us that Mr. Greebel is
11 saying, well, I'm not going to put the government to its
12 burden of proof on the crime itself. It's very different
13 than a crime like a stabbing where everybody agrees that a
14 crime occurred. So there's this amping up of the rhetoric
15 in order to achieve a severance, and we are not convinced I
16 think that in a separate trial Mr. Greebel would take the
17 same position. For example, stipulating to the fact that
18 Mr. Shkreli committed multiple crimes and this was a fraud,
19 and that the only issue in question is whether or not
20 Mr. Greebel knew about it. And so we're very concerned I
21 think that there has been kind of this heated rhetoric in
22 the severance phase that will not actually carry through.

23 THE COURT: Well, how am I to discern whether this
24 is part of a strategy, and I say this with respect to the
25 defense lawyers who are experienced and know what they're

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1 doing? How am I to discern that, and should I even worry
2 about discerning it if they have said as officers of the
3 court that they intend to go after one another, they intend
4 to point the finger at their codefendant and argue that they
5 lied and that they're not trustworthy and that they are
6 guilty.

7 MS. SMITH: Obviously, that's at the end of the
8 day, a decision that the Court has to make. I think that we
9 are flagging the issue because we're concerned about
10 inconsistent litigation positions down the road.

11 THE COURT: Well, then they may well change their
12 litigation strategy and they often do.

13 MS. SMITH: Right.

14 And there's case law that suggests that that can
15 then be used against them if that's the case.

16 THE COURT: Well, we'll see what happens.

17 MR. BRAFMAN: Can I just say very briefly, Your
18 Honor.

19 After listening to Mr. Brodsky, the suggestion
20 that we are engaging in a joint strategy so that we can
21 obtain a severance I think is kind of a specious argument.
22 I will also say that I've been in cases where an attorney
23 and the client have been both defendants at bar, but they
24 were both intent on defending the integrity of the case and
25 they were both putting the government to their proof.

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1 What we heard from Mr. Brodsky on behalf of
2 Mr. Greebel is not that he didn't get all of the
3 information. It's different if their defense was, you know
4 what, on some of these things I was just not told. Their
5 position is we were affirmatively lied to. We were
6 affirmatively lied by to Mr. Shkreli. Mr. Shkreli is
7 guilty. And I think that is not ramping up the rhetoric,
8 that's his defense. And if that's his defense, it can't be
9 undertaken I believe at a case where Mr. Shkreli is going to
10 proceed to his own trial on a presumption of innocence.

11 Thank you.

12 THE COURT: All right. Is there anything else
13 Ms. Smith?

14 MS. SMITH: Your Honor, just very briefly I think.
15 Mr. Brodsky went through a series of lies that he
16 says that Mr. Shkreli told Mr. Greebel and, you know, we're
17 not engaging on the evidence right now. We're not at trial.
18 But, you know, from the government's perspective, it's not a
19 lie if you're told something that you already know. And so
20 to just say that clearly the documents show that it's a lie,
21 really the issue is going to be what did Mr. Greebel know,
22 and it sounds like he's going to need to take the stand to
23 say that he didn't actually know that information. But I
24 don't think it can be shown from the documents necessarily
25 that there were certain lies that took place.

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1 The other issue I just wanted to raise, which I
2 think is important, is this idea that Mr. Greebel has
3 confidential or privileged information that he is going to
4 cross examine Mr. Shkreli with. I think the word
5 "privilege" is a problem and I'm concerned about the word
6 "confidential" as well. I mean, Mr. Greebel says he didn't
7 have a personal attorney-client relationship with
8 Mr. Shkreli. I mean, that's his position.

9 And we also know that Mr. Shkreli has waived on
10 the MSMB counts and that Retrophin has waived privilege with
11 respect to all of the issues that touch on the criminal
12 conduct here. I am not sure what that bucket of additional
13 information would be that he would cross him with. If it's
14 information that they shared as co-conspirators or as
15 friends or in late night conversation, I don't see how any
16 of that is privileged or confidential.

17 And if it's other areas of the Retrophin
18 representation, I mean, the other areas are things like drug
19 acquisitions and patent applications. I mean, I just don't
20 know why that would be the subject of cross examination
21 specifically. So I just wanted to kind of this idea that
22 there's an enormous amount of privileged information that
23 Mr. Greebel holds is actually contradictory to his own
24 statements that he wasn't Mr. Shkreli's personal attorney,
25 and I just think that's a misleading representation.

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1 THE COURT: So what are you proposing to get to
2 the bottom of it?

3 MS. SMITH: What am I proposing?

4 THE COURT: Yes. In terms of the evidence that
5 has not yet been produced to the government. I think
6 Mr. Brodsky did later say that this was evidence that he
7 received from the government and you're not aware of it
8 somehow.

9 MS. SMITH: I'm actually not sure. I think it's
10 this idea that Mr. Greebel knows other information that
11 might show that certain things weren't true, and I
12 understand that's potentially for credibility. But I still
13 think that would be encompassed in everything related to
14 MSMB and anything touching on Retrophin that's already been
15 charged, but I just am not sure what that extra bucket of
16 mysterious information might be. And we agree with you,
17 obviously we have certain reciprocal requests for discovery.
18 And, you know, to the extent that the defendants are going
19 to actually produce exhibits at trial, we would expect that
20 those would be produced to us prior to trial.

21 MR. BRODSKY: Your Honor, I'll touch on that point
22 and then the other points.

23 From the government's discovery, millions of
24 pages, and this is why the trial was delayed. Our client is
25 going through every page. We're going through every page.

1 I understand the government juggling 40, 50, 60 cases each
2 of them with investigations and everything else that they
3 can't possibly go through every page. Moreover, if they go
4 through every page, they won't understand the significance
5 the way our client will. And I proffer to Your Honor that
6 in the discovery lies evidence of Mr. Shkreli's other crimes
7 and misconduct that the government has not identified.

8 I also proffer to Your Honor that there is
9 privileged communications that are beyond what Retrophin has
10 waived, that Shkreli, in connection with providing
11 information to Mr. Greebel about other areas of
12 representation, and, remember, their -- Mr. Greebel, and the
13 government concedes this -- is outside counsel for
14 Retrophin. He was outside counsel to him for numerous
15 matters.

16 Both the government and Mr. Shkreli bolstered up
17 the \$10 million number and the hours for which Mr. Greebel
18 worked. And Your Honor put their finger on it when you said
19 statistically why does that matter? Well, it doesn't for
20 purposes of these charges, but it does matter in the sense
21 that it proves, if you go through the invoices, there are
22 lots of different conversations over lots of different
23 matters. And we do have evidence that's privileged in the
24 possession of Retrophin, but it's also in Mr. Greebel's mind
25 and the privilege has not been waived. And we will use that

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1 offensively against Mr. Greebel.

2 THE COURT: So you're saying Mr. Greebel didn't
3 know it at the time he received the information that
4 Mr. Shkreli was lying but now he does?

5 MR. BRODSKY: Yes. Yes.

6 And, Your Honor, I must say, I, I don't know how
7 to respond, really, I just don't know how to respond when
8 the government says that they think we're ramping up to get
9 a severance.

10 I commit to Your Honor -- I'm happy to take the
11 witness stand right here --

12 THE COURT: It's all right.

13 MR. BRODSKY: -- but I commit to you in a trial
14 against Mr. Greebel alone, our best defense is to prove the
15 lies. I mean, if you think about it, Your Honor, we have
16 been accused -- my client has been accused of engaging in a
17 scheme with the principal, the client representative of his
18 client to commit criminal crimes. What is the natural
19 defense to that?

20 The natural defense to -- if true, is how can I be
21 part of this scheme with this conniving guy if he lied to me
22 and he deceived me? For the government to suggest we're not
23 going to say that would be to ignore their evidence that
24 they say he lied to auditors, he lied to Retrophin. They
25 say he lied to the board. They say he lied to lawyers.

1 They say he lied to MSMB Healthcare investors. They say he
2 lied to MSMB Capital investors, they say he lied to
3 everybody, and then they say but not Mr. Greebel. He's the
4 only one he didn't lie to.

5 I submit to Your Honor in a trial just of
6 Mr. Greebel, our defense will be the same. It will be that
7 he was a liar and a deceiver. And I don't know why the
8 government questions that when they acknowledge and admit on
9 their own that he is a liar and a deceiver. That's what
10 they've charged him with.

11 Your Honor, with respect to the case law, it's not
12 a morass. If you look at the case law, there are actually
13 core principals that are consistent throughout the cases,
14 and Your Honor has cited them in your own case, U.S. v.
15 Faltine. Your Honor has cited them in other severance
16 cases.

17 Where there's mutual antagonism, the first
18 question any court looks at is: Is there inherent mutual
19 antagonism or is it just finger pointing between two guys or
20 a man and a woman who are defendants?

21 The Scott case was finger pointing. The Scott
22 case was the lawyer was saying, hey, I acted in good faith.
23 The guy gave me information and I followed it, but I don't
24 think he committed a crime. And the client was saying,
25 look, I gave him information and just followed the advice.

1 Nobody was accusing each other of being deceptive, and
2 that's the Scott case.

3 The Abakporo case, which the government relies on,
4 is -- and the government relies on it for a proposition but
5 ignores what it actually says. The case, and I quote says,
6 "Defenses are mutually antagonistic when accepting one
7 defense requires that the jury must, of necessity, convict a
8 second defendant." And then they say that is what is known
9 as "legally cognizable prejudice."

10 I submit to Your Honor all the cases have the same
11 pronunciation of what genuine mutual antagonism is, and that
12 it's not finger pointing. It's if you accept the defense of
13 one defendant and that requires the jury to convict the
14 other, that is a legally cognizable prejudice. Questions
15 are over. And we laid out additional prejudices because we
16 thought we should.

17 When the government surprised us with their
18 opposition and they said it was a three-part test, which we
19 had never seen in any case anywhere, including in Your
20 Honor's, and when they suggested that even with mutual
21 antagonism, which is genuine and irreconcilable, you need to
22 find prejudice, we were shocked by it. Truly. It was the
23 first time we had seen the argument. It didn't come up in
24 Aronson, it didn't come up in any other cases.

25 And so what we did was we put in Professor

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1 Frisch's declaration, if they want to throw it out, that's
2 up to them. In our view, what Professor Frisch says is
3 undisputable. And Your Honor can find it as a matter of
4 law. Your Honor can find it as a matter of logic. We put
5 in Professor Frisch's declaration because we wanted to show
6 from somebody who has enormous experience in attorney-client
7 relationships in ethical advice as to the inherent problem
8 of having an attorney and a client representative charged
9 together where the attorney alleges deception and the client
10 says I acted in good faith on your communication. And we
11 did it in response.

12 The other thing, Your Honor --

13 THE COURT: Plus he's saying we'd likely see a
14 scenario though if an attorney and client are charged
15 together that they would raise this defense where each would
16 point the finger at the other and say, you know, the client
17 lied to me and the attorney knew but gave me bad advice,
18 that the whole issue about severance would sort of become a
19 situation where the Court would be compelled to grant
20 severance in every case where a defense lawyer got up and
21 said we're going to take these acts? Don't I have to look
22 at whether there's really genuine antagonism and whether
23 there will be prejudice if --

24 MR. BRODSKY: Yes.

25 THE COURT: -- we try the defendants together?

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1 So I don't think the government is wrong in saying
2 that prejudice is part of the evaluation.

3 MR. BRODSKY: I think finding out whether or not
4 it's a genuine mutual antagonism. Maybe we're conflating
5 two different things, which is fine.

6 THE COURT: Well, they had a three-part test so I
7 think you were troubled by the third factor.

8 MR. BRODSKY: I was troubled by it. If you find
9 genuine mutual antagonism, I definitely think you have to
10 look to see whether mutual antagonism is just mere finger
11 pointing or genuinely one defendant's lawyer will get up and
12 accuse the other defendant as -- with crimes and prove it.
13 I do think you have to look at that.

14 But once you find genuine mutual antagonism, I
15 think the case law shows from Abakporo to Serpoosh to your
16 case in Faltine, Your Honor, to every other case, it's
17 legally cognizable prejudice, and you don't need to go
18 beyond that to then say how are they going to prove that's
19 prejudicial because I think it's obvious, but nevertheless
20 we laid out the different prejudices.

21 What I hear the government saying, Your Honor,
22 what I hear the government saying is what they're not
23 saying. They're not saying if you find genuine mutual
24 antagonism between us, and we're not ramping it up for
25 purposes of just ramping up, and we tell them as an officer

1 of the court, Your Honor, I tell them we're not. That's why
2 we tried to put in specific examples, that's why I submitted
3 an declaration which I don't take lightly, that's why we
4 stand before Your Honor and we actually submitted all these
5 particulars. The notion that we were ramping up, we
6 submitted -- we knew we were going to submit something that
7 was going to completely inflame and bother Mr. Shkreli. We
8 didn't do it until we absolutely had to do it. It's not
9 enjoyable sort of putting in all this evidence of somebody
10 being a fraud. I'm on the defense side now so I don't
11 particularly enjoy it unless I'm a civil plaintiff and I'm
12 charging someone with fraud and they committed it, but I
13 don't particularly enjoy it. But we had to do it, and we
14 did it in good faith, Your Honor.

15 And I think what the government is saying is if
16 you're convinced that Mr. Greebel is going to definitely
17 assert that Mr. Shkreli is a liar and a deceiver at trial,
18 genuinely, I think they're recognizing there has to be a
19 severance.

20 Finally, Your Honor, in terms of their argument
21 about the complexity of the case versus the simplicity of
22 the case, I don't think it makes sense. Aronson, W.R.
23 Grace, both extraordinarily complex cases. In a simple case
24 where you have a bag of drugs and people have to debate
25 about which two people actually controlled the bag, if

1 there's genuine mutual antagonism and they both say it's
2 yours and you knew it was drugs, fine, that's a simple case.
3 But in a complicated case it's far worse.

4 Why is it far worse? We're going to not just
5 stand up in a one-day trial or a two-day trial and accuse
6 Mr. Shkreli of lies, we're going to do it every other hour
7 every chance we get in terms of cross examinations through
8 every witness on every day of trial. Our narrative is going
9 to be clear, and it's going to be not just one day, but one
10 week and then the next week and the next week.

11 So the complexity of the case means the case is
12 going to be longer. It's going to be that there are more
13 incidents and more examples of mutual antagonism. And more
14 examples of mutual antagonism simply mean more confusion for
15 the jury and more likely prejudicial effect that they say,
16 ah, forget the both of them. We're tired of them. They're
17 both yelling at -- screaming at each other and they'll find
18 them both guilty.

19 Your Honor, my colleague, Mr. Chan, might address
20 or would address, if he wants to, the spillover and the --

21 MR. CHAN: Sure. Just really briefly. I think
22 most of these points have been covered, but since Ms. Smith
23 brought up the other three points in our brief, I'll just
24 quickly say a few things.

25 I think that -- we can't too quickly dismiss the

1 risk of spillover prejudice either. I agree that the main
2 part of our argument is the mutual antagonism argument, but
3 I think that if you consider all of our other arguments as a
4 cumulative argument for severance, I think it is even
5 stronger.

6 With respect to the concept that just -- that the
7 government says that if we have two separate trials, we will
8 necessarily have the same evidence in both that we will seek
9 to admit against one defendant versus both defendants
10 together. I think that's just not true.

11 Similar to Ms. Smith's point about saying
12 something in the context of a severance motion, the
13 government often says if you grant a severance, we'll put it
14 all in the same evidence anyway. And as I think we all know
15 in this courtroom, that doesn't always happen because things
16 change, because the practicality has changed and because
17 404(b) says that you can't always do that.

18 So, for example, here concretely I do not think
19 that the government would seek, but even if it sought, we
20 would fight, their attempt to get in every detail about our
21 co-defendant's earlier MSMB-related frauds just to prove
22 context of the counts that we're charged in. I think
23 there's a line and they can't cross it, and the line is
24 different in a solo case versus a joint case. So I think
25 their statement that we'll put in all the same evidence is

1 overstating.

2 We didn't talk about a class of evidence today yet
3 which is the class of evidence that would not come in in the
4 solo case of ours that would come in in a joint case. So,
5 for example, the government has relied often on evidence
6 that it says shows our co-defendant's propensity towards
7 violence and threatening witnesses. They did that in
8 connection with discovery motions to oppose granting certain
9 discovery that both defendants requested. That kind of
10 evidence would not be admissible in a solo trial against our
11 defendant.

12 They also say, you know what, there are post
13 arrest statements by our codefendant that we can sanitize to
14 avoid Bruton problems, but as Mr. Brafman says, I don't know
15 how they can do that. So even though they can take out the
16 name of our client, you will have post arrest statements
17 involving the earlier MSMB-related frauds that they will --
18 that they have charged our codefendant with, that they have
19 admitted our client is not charged with or guilty of, but
20 they want to admit that conduct as context of the counts
21 that are charged against our client. So they will have a
22 post arrest confession that relates to this earlier fraud
23 that they say is relevant, that earlier fraud is relevant to
24 our client and they will somehow want to keep that post
25 arrest statement out. I don't think you can do that and I

1 don't think Bruton, the level of sanitation is possible in
2 that scenario because all those statements will go to
3 establish the earlier fraud which the government is arguing
4 is relevant and should be admitted against our client as
5 some sort of contextual evidence.

6 The last point I'll make is that with respect to
7 the argument about notoriety, we aren't -- we didn't make
8 that last argument as an evidentiary argument. We're not
9 saying that that evidence is going to come in necessarily
10 one way or the other. Although the government has said here
11 today that there are some instances in which they would seek
12 to use it as evidence of impeachment, depending how the
13 trial plays out. So there is even another scenario where we
14 don't know now, but there could be evidence that wouldn't be
15 in our solo trial that might come in at the government's
16 request.

17 Putting that aside, our point was that that
18 conduct, which we detail in our appendix and I won't go over
19 it here, but that conduct effects the jury pool; that jury
20 pool effects us. And so to the extent that we will be stuck
21 in a joint trial where that jury pool has already been
22 effected, notwithstanding the statements about what people
23 may or may not do in the future and what I know is the
24 Court's ability to control the courtroom. But what has
25 already happened is that we have a jury pool that is skewed

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1 to be predisposed to a case where we are with our
2 codefendant versus not.

3 THE COURT: Why do you say that? What's your
4 basis?

5 MR. CHAN: The basis is that --

6 THE COURT: Have you done research?

7 MR. CHAN: I don't think I need to do true
8 research in the sense that if you just talk to anybody in
9 the public about whose name they know better, they know
10 one -- our co-defendant's name better, and they know it for
11 negative reasons. Right?

12 And so I think that you have that well-established
13 notoriety for bad reasons. And on top of that, you would
14 have the evidence we pointed out in our appendix that shows
15 a concerted effort by our codefendant to make that notoriety
16 happen.

17 THE COURT: Well, I think during voir dire you're
18 going to have an opportunity to question potential jurors
19 about any knowledge or information or impression that they
20 may have, and you might be surprised to learn that many of
21 them have never heard of Mr. Shkreli. It could be the case.
22 I just didn't know if you had actual information or evidence
23 that, in fact, he is as notorious as you all think he is.

24 MR. CHAN: Not beyond what's cited in our briefs.

25 MR. BRAFMAN: Your Honor, I just want to very,

1 very briefly respond.

2 It's very hard as a defense lawyer to sit and
3 listen to a co-counsel for a co-defendant, not the
4 government, but co-counsel for a co-defendant say over and
5 over again that my client is a liar and my client is a
6 deceiver and my client is so notorious that they could not
7 get a fair trial sitting next to him.

8 I will tell you I believe there should be a
9 severance because of their position, but in fairness to
10 Mr. Shkreli, I will tell you that having spent a lot of time
11 with him in public arenas on occasion, the notoriety works
12 both ways. Many people think he's the person who's going to
13 find the cure to certain dreaded diseases and stop us on
14 occasion, on many occasions, to take selfies because they
15 admire and respect him. So I deny the notoriety even though
16 I'm going to want to participate in a careful voir dire.

17 I will also tell you that to the extent that they
18 have spent an hour calling my client a liar and a deceiver,
19 that may support the argument for severance, and I agree.
20 But just so the position is clear, we intend to take the
21 position at trial, one way or another, that my client hired
22 a very, very good lawyer from a very, very prominent firm to
23 which he paid \$10 million for the distinction of getting
24 indicted.

25 THE COURT: All right. Thank you.

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1 Does anyone have anything else?

2 MS. SMITH: Not unless you have any questions.

3 THE COURT: All right. Thank you. I appreciate
4 your time.

5 MR. BRODSKY: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 Have a good day.

8 (Proceedings adjourned at 2:44 p.m.)

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